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Goodbye Earl: Domestic Abusers and Guns in the Wake of *United States v. Castleman*—Can the Supreme Court Save Domestic Violence Victims?

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I. INTRODUCTION

"How she realized at last that not even love could justify this, that no affection could, not ever. Still, in the glass, she sees her own mouth, opening and closing and silent as a fish."[1]

Laura Aceves was only twenty-one years old when she made her final frantic call to the police for help.[2] "No one else would have done this," Laura told police as she received the news that someone poured bleach in her gas tank.[3] Standing on the side of the road alone, Laura was helpless as she watched her car break down from the actions of her abusive ex-boyfriend, Victor Acuna-Sanchez. However, despite Laura's persistent pleas for help, the police officers were unable to find Victor, who was out on bail awaiting trial for felony aggravated assault.[4] Two days later, Laura died from a gunshot wound to her head.

Although Laura was two years older than Victor and had two children from a previous relationship, the couple began dating almost immediately after meeting at a friend's birthday party in 2011.[5] From

1. Zoë Brigley, Conquest (2012).
2. Melissa Jeltsen, *This is How a Domestic Violence Victim Falls Through The Cracks*, Huffington Post (June 16, 2014, 10:00 AM), http://www.huffingtonpost.com/2014/06/16/domestic-violence_n_5474177.html, *archived at* http://perma.unl.edu/GXC9-WL98.
3. *Id.*
4. *Id.*
5. *Id.*

the beginning, Victor was violent, beating Laura on a weekly basis and subjecting her to "a harrowing cycle of harassment."[6] Deeply controlling, Victor burned Laura's passport, social security card, and birth certificate in an effort to ensure she could never leave him.[7] When Laura attempted to flee, Victor knew how to find her, and would destroy her possessions until she returned. Finally, after becoming pregnant with Victor's child, Laura received a temporary restraining order against Victor.[8]

Unfortunately, Laura's subsequent attempts to leave the abusive relationship were met with violence, threats, and destruction, and all were unsuccessful. Discouraged, Laura refused to seek a permanent restraining order, and the abuse escalated after the birth of Victor's child.[9] Victor proceeded to beat and strangle Laura, smash her car with a hammer, destroy the baby's car seat, and steal her belongings.[10] Although Victor was arrested and charged with aggravated assault, the court granted him bail and placed him on probation.[11] Victor never checked in with the probation office despite orders to call twice a week.[12] Furthermore, in violation of the no-contact order issued upon his arrest, Victor forced Laura to ride in a vehicle with him.[13] While the police arrested Victor for this violation, the judge released Victor on his personal recognizance.[14] "That was the last time he was in police custody while Laura was still alive."[15]

On Christmas day, Laura informed Victor that she was leaving town. Allegedly, Laura had saved enough money to rent an apartment in Missouri with a friend.[16] On New Year's Eve, police discovered Laura dying on the floor of her apartment. She didn't make it to the New Year. Police arrested Victor at his mother's home hours later, where they found him hiding in the shower with a .22-caliber handgun, thirty-nine bullets, and the key to Laura's apartment.[17]

Although tragic, Laura's story is not unique. On average, forty-six American women are shot to death each month at the hands of men they love.[18] Of all female homicide victims, approximately thirty-three percent are killed by an intimate partner, and this rate of do-

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Linda McFadyen-Ketchum, *Supreme Court Must Protect Victims of Domestic Violence*, HUFFINGTON POST (Jan. 15, 2014, 10:18 AM), http://www.huffingtonpost.

mestic homicide is steadily increasing.[19] When examining deaths by firearms specifically, over two-thirds of females are murdered by intimate partners.[20] The mere presence of a gun in a relationship plagued by domestic abuse increases this risk of homicide by a factor of six.[21] It is therefore undeniable that "[b]eing shot by an intimate partner is the most common cause of intentional death of women in this country."[22]

Despite the prevalence of domestic violence in America, and the brutality inflicted upon the victims, perpetrators are typically only charged with misdemeanors—if they are charged at all. The most common punishments include probation, a suspended sentence, or, rarely, imprisonment, which cannot exceed one year.[23] Conviction of

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com/linda-mcfadyenketchum/supreme-court-must-protect-victims-of-domestic-violence_b_4602303.html, *archived at* http://perma.unl.edu/56F4-M2PR.

19. EVE S. BUZAWA ET AL., RESPONDING TO DOMESTIC VIOLENCE: THE INTEGRATION OF CRIMINAL JUSTICE AND HUMAN SERVICES 25 (4th ed. 2012); *see Domestic Violence*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/images/National_Domestic_Violence_Statistics.pdf (last visited Aug. 1, 2014), *archived at* http://perma.unl.edu/XB45-NF8W.

20. Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination,* 79 FLA. B.J. 79, 79 (2005); Laura Finley, *Guns and Domestic Violence: A Lethal Mix*, PEACE VOICE (Oct. 3, 2013), http://www.peacevoice.info/2013/10/03/guns-and-domestic-violence-a-lethal-mix/, *archived at* http://perma.unl.edu/7ND6-4Q26. In 1996, approximately sixty-five percent of intimate partner homicides were committed using a firearm. Thomas J. Leroe-Muñoz & Shabnam Roohparvar, *Federal Domestic Violence Law*, 8 GEO. J. GENDER & L. 311, 320 (2007). This figure has been estimated to be as high as seventy percent in previous years. *See* Charles M. Watts Jr., *The Lautenberg Amendment: Should the Federal Government be Required to Notify State Governments and Citizens when it Enacts a Malum Prohibitum Criminal Law Whose Punishment is a Felony Resulting in Extended Incarceration?*, 12 LOY. CONSUMER L. REV. 234, 236 (2000).

21. Amy Barasch, *Why Give Violent Domestic Abusers a Gun?*, SLATE (Jan. 15, 2014, 6:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/01/supreme_court_hears_castleman_this_insane_suit_would_give_guns_to_domestic.html, *archived at* http://perma.unl.edu/W2H2-EFYR. Some studies estimate that the presence of a gun can increase the risk of homicide twenty-fold after an incident of domestic violence has occurred. *See* Babak Lalezari, *Domestic Violence: Enough is Enough, Any Force is Enough*, 1 PHOENIX L. REV. 295, 295 (2008).

22. Barasch, *supra* note 21; *see* Polly M. Pruneda, *The Lautenberg Amendment: Congress Hit the Mark by Banning Firearms from Domestic Violence Offenders*, 30 ST. MARY'S L.J. 801, 803 (1999) (stating that "incidents of gun-related domestic violence . . . are not uncommon in the United States").

23. *See also* Jamie Doward, *Teesside Judge Far Too Soft on Domestic Abusers, Say Three Police Commissioners*, GUARDIAN (Oct. 18, 2014), http://www.theguardian.com/society/2014/oct/18/teesside-judge-far-too-soft-on-domestic-abusers-say-three-police-commissioners, *archived at* http://perma.unl.edu/FZ8V-WX7K (questioning the leniency certain judges apply in domestic violence cases); Samantha Pidde, *Man Granted Suspended Sentence in Domestic Abuse Case*, CLINTON HERALD (Sept. 20, 2014, 11:07 AM), http://www.clintonherald.com/news/article_337d81c6-40e0-11e4-a1e0-1bd25c776144.html, *archived at* http://perma.unl.edu/Q27E-863G.

a misdemeanor carries no firearm prohibition, and is often expunged from a perpetrator's record upon completion of a domestic batterer's course or psychological counseling. This legal framework has proved devastating for domestic violence victims, given that at least half of domestic violence defendants who murder their partners have criminal histories and legal access to firearms.[24]

Recognizing the lethal connection between intimate partner violence and homicide, Congress enacted the Domestic Violence Offender Gun Ban in 1996. Frequently referred to as the Lautenberg Amendment, after the late Senator Frank R. Lautenberg (D-NJ), the legislation prohibits any individual convicted of a misdemeanor crime of domestic violence from purchasing or owning a gun.[25] With the primary purpose of "sav[ing] the life of the ordinary American woman," the Lautenberg Amendment sought to close a dangerous loophole in gun control laws by keeping firearms away from violent individuals threatening their families.[26] Thus, the Lautenberg Amendment acts as a preventive measure by attempting to "target deadly abuse before it happens."[27]

Although well-intentioned, the Lautenberg Amendment has been subject to conflicting interpretations that have limited its effectiveness. In particular, courts have disagreed over whether an offense must involve violent physical force to qualify as a misdemeanor crime of domestic violence. This confusion existed for almost two decades before the United States Supreme Court intervened to clarify the statutory requirements in March 2014. In a unanimous opinion, the Court held that *any* application of physical force against a domestic partner could satisfy the requirements for a misdemeanor crime of domestic violence.[28] The force need not be violent or excessive. More specifically, this requirement of "physical force" is expressly satisfied by the degree of force supporting a common law battery conviction.[29]

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24. *See* Maria Kelly, *Domestic Violence and Guns: Seizing Weapons Before the Court Has Made a Finding of Abuse*, 23 VT. L. REV. 349, 363 (1998).
25. 18 U.S.C. § 922(g)(9) (2014).
26. Gaylynn Burroughs, *Supreme Court Will Decide on Re-Arming Domestic Abusers*, MS. MAG. (Jan. 16, 2014), http://msmagazine.com/blog/2014/01/16/supreme-court-will-decide-on-re-arming-domestic-abusers/, *archived at* http://perma.unl.edu/C3F7-ASWV; *see* Abigail Browning, *Domestic Violence and Gun Control: Determining the Proper Interpretation of "Physical Force" in the Implementation of the Lautenberg Amendment*, 33 WASH. U. J.L. & POL'Y 273, 279 (2010).
27. Lisa D. May, *The Backfiring of the Domestic Violence Firearms Ban*, 14 COLUM. J. GENDER & L. 1, 6 (2005).
28. United States v. Castleman, 134 S. Ct. 1405, 1413 (2014).
29. *See* Luke Rioux, *How Domestic Violence Convicts Might Get Their Guns Back:* Castleman & Armstrong, PORTLAND PRESS HERALD (Apr. 10, 2014), http://contributors.pressherald.com/news/harmless-error/how-domestic-violence-convicts-might-get-their-guns-back-castleman-armstrong/, *archived at* http://perma.unl.edu/WYL4-4GYB.

By interpreting the physical force requirement broadly, the Supreme Court received widespread praise for taking an active stance against domestic abuse.[30]

While the Supreme Court's decision in *United States v. Castleman* is emotionally appealing, it is precedentially erroneous and offers little practical assistance to domestic violence victims. This Article explores the faulty reasoning espoused by the Supreme Court in arriving at its activist decision, and illustrates the minimal impact this opinion will have on the lives of female victims. Specifically, this Article highlights the low prosecution rates under the federal firearms ban and explains why proposed legislative initiatives will be unsuccessful in appreciably reducing domestic abuse. In support of these arguments, this Article is divided into five parts. Part I provides a detailed overview of domestic violence, including the lethal interaction of domestic violence and firearms. This section further details the history of legal remedies and the rise of judicial action against domestic violence. Part II offers a succinct overview of the Lautenberg Amendment, exploring the legislation's passage and purpose. Part III then highlights the circuit split regarding the type of physical force necessary for an offense to qualify as a misdemeanor crime of domestic violence, and resolves this disagreement by summarizing the Supreme Court's holding and reasoning in *Castleman*. Part IV then transitions into an informative analysis and argues that the Supreme Court's ruling visibly departs from precedent. This section also challenges the effectiveness of legal responses to domestic violence and articulates why upcoming legislative proposals are similarly flawed and ineffective. As a remedy, this section advocates early proactive intervention in the form of educational programs, and further offers strategic advice for prosecutors and defense attorneys to heighten success at the plea bargaining table. Finally, Part V concludes the Article.

II. FISTFUL OF LOVE: UNDERSTANDING DOMESTIC VIOLENCE

Domestic violence is a universal constant plagued by an ever-evolving definition. For aggressors, domestic abuse is a method of "keeping women in their place, literally confined to relationship, household, or

30. *See, e.g.*, Lynn Rosenthal, *Supreme Court Decision in* U.S. v. Castleman *Will Save Women's Lives*, WHITE HOUSE (Mar. 28, 2014, 2:23 PM), http://www.whitehouse.gov/blog/2014/03/28/supreme-court-decision-us-v-castleman-will-save-womens-lives, *archived at* http://perma.unl.edu/9HYU-V4H5 (describing the Court's decision as "a landmark opinion" that "will save women's lives"); *SCOTUS Bolsters Domestic Violence Gun Ban*, HASTINGS WOMEN L.J. (Apr. 18, 2014), http://hastingswomenslj.org/journal/2014/4/8/scotus-bolsters-domestic-violence-gun-ban-1, *archived at* http://perma.unl.edu/CTC8-ZCHD ("[T]his decision has already been dubbed landmark and critical in the crusade to end domestic violence across the United States.").

family structures defined by patriarchal authority."[31] As an ongoing strategy of intimidation and isolation, domestic violence represents an extreme and persistent attempt to control a partner's behavior.[32] While the legal conception of this abuse focuses heavily on physical battering, the reality is a compound mixture of emotional, psychological, verbal, and physical torment that occurs in a repeated cycle.[33] Domestic violence thus centers on the principles of power and control, and "cuts across all racial, economic, social, and sexual preference backgrounds."[34]

Although both men and women commit acts of domestic abuse, intimate partner violence is the leading cause of injury to women in the United States.[35] Over eighty-five percent of domestic violence victims are female, and this abuse results in more than 18.5 million mental health care visits each year.[36] An estimated 1.3 million women have been physically assaulted at the hands of an intimate partner, and one in every four women will experience domestic violence in her lifetime.[37] With regards to physical abuse, recent estimates indicate that between twenty-two and thirty-five percent of emergency room visits are due to injuries sustained from physical abuse.[38] Given this data and the prevalence of domestic violence, women are much more susceptible to abuse inside the home than in any other place.[39] The prob-

31. JONI SEAGER, THE PENGUIN ATLAS OF WOMEN IN THE WORLD 28 (4th ed. 2009).
32. BUZAWA ET AL., *supra* note 19, at 75 (noting that domestic violence "is the logical outcome of a continuum of conduct centered on a pattern of coercive controls established by a dominant partner").
33. *See* Sharon L. Gold, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 938–39 (2003) (explaining that domestic violence occurs in phases called the Cycle Theory of Violence).
34. *Id.* at 937.
35. Leroe-Muñoz & Roohparvar, *supra* note 20, at 312; Lynn D. Wardle, *Marriage and Domestic Violence in the United States: New Perspectives About Legal Strategies to Combat Domestic Violence*, 15 ST. THOMAS L. REV. 791, 794 (2003); Watts Jr., *supra* note 20, at 236.
36. *Domestic Violence*, *supra* note 19.
37. *Id.*
38. Albert R. Roberts, *A Comparative Analysis of Incarcerated Battered Women and a Community Sample of Battered Women*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 31 (Albert R. Roberts ed., 1996); Wardle, *supra* note 35, at 794; *see* Diane C. Dwyer et al., *Domestic Violence and Woman Battering: Theories and Practice Implications*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 75 ("Battering is the single most common cause of emergency room treatment for women and the major antecedent of injury to women, leading to approximately 25 percent of female suicide attempts and 4,000 homicides per year."). In any given year, approximately one million women will seek medical treatment for injuries received from a domestic partner. Joshua M. Jones, *18 U.S.C. § 922(g)(9) and the Circuit Split: The Case for a Broad Definition of Domestic Violence*, 45 CRIM. L. BULL. 82 (2009).
39. SEAGER, *supra* note 31, at 28; *When Men Murder Women: An Analysis of 2011 Homicide Data*, VIOLENCE POL'Y CENTER, http://www.vpc.org/studies/wmmw2013.

lem of domestic violence is thus a ubiquitous constant for women worldwide and is more accurately categorized as an epidemic.[40]

A. You Knocked the Love (Right Outta My Heart): Explaining Domestic Abuse

Despite the universal nature of domestic abuse, the term "domestic violence" lacks a conclusive definition.[41] The characterization and interpretation of domestic violence alters with the changing social constructs, and denotes a spectrum of behaviors committed by intimate partners.[42] Including both physical and non-physical behavior, domestic violence encompasses ridicule, name-calling, excessive monitoring of the partner, verbal threats, stalking, spitting, scratching, biting, grabbing, punching, kicking, choking, rape, sexual coercion, and death.[43] Abusive intent is the dominant theme in these domestic attacks, and even minor physical contact constitutes domestic violence.[44] Because batterers can change tactics over time, domestic abuse is a fluid and dynamic process in which no two experiences are identical. Accordingly, the reality of domestic violence differs for each individual, making a comprehensive definition of the term impractical.

While the spectrum of acts constituting domestic violence is vast, the pattern of abuse typically follows a predictable cycle and escalates in severity over time.[45] According to the Cycle Theory of Violence developed by Lenore Walker, violent relationships comprise three distinct phases.[46] During Phase I, the Tension-Building Phase, the abuser exerts control over the victim through minor battering inci-

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pdf (last visited Sept. 3, 2014), *archived at* http://perma.unl.edu/RV35-LPK5 [hereinafter *Men Murder Women*].

40. Gold, *supra* note 33, at 937; *see* SEAGER, *supra* note 31, at 28.
41. Wardle, *supra* note 35, at 792.
42. *See* VENESSA GARCIA & PATRICK MCMANIMON, GENDERED JUSTICE: INTIMATE PARTNER VIOLENCE AND THE CRIMINAL JUSTICE SYSTEM 19 (2011) ("Society's definitions of intimate partner violence have always been dependent on the social constructs of the day.").
43. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 65 (2000) (explaining that domestic violence includes "a continuum of sexual and verbal abuse, threats, economic coercion, stalking, and social isolation"); *see also* MANDY BURTON, LEGAL RESPONSES TO DOMESTIC Violence 3 (2008) ("The violence may include physical, emotional and financial abuse.") (internal quotation marks omitted); Gold, *supra* note 33, at 937–38 (describing incidents of physical and psychological abuse, including name calling, taunting, pinching, biting, slapping, and public humiliation).
44. *See* Dwyer et al., *supra* note 38, at 68 (stating that domestic violence is the result of "intentional, hostile, and aggressive physical or psychological acts").
45. United States v. Castleman, 134 S. Ct. 1405, 1408 (2014).
46. *See* LENORE E. WALKER, THE BATTERED WOMAN 55–71 (1980) (describing the Cycle Theory of Violence).

dents.[47] The principal form of abuse at this stage is verbal and emotional, including accusations, putdowns, and insults.[48] In return, "[t]he battered woman tries everything to prevent the impending violence, but the tension inevitably escalates into a violent episode."[49] During these episodes, the attacker becomes oppressive while the victim assumes a passive role in an attempt to appease her abuser.[50] The victim eventually experiences feelings of helplessness, and the tension reaches an unbearable climax.[51]

As a direct result of this buildup and climax, the abuser erupts into violence in Phase II, the Acute Battering Incident.[52] The violence increases in severity from minor incidents to unstoppable rage, and can result in physical injury.[53] The victim is extremely vulnerable at this stage, and feels psychologically trapped.[54] This vulnerability, in turn, perpetuates the dangerous environment, making this the most likely stage for serious physical injury.[55] This phase lasts between two and twenty-four hours and is the shortest phase of the cycle.[56]

Finally, following the battering incident, the victim and abuser enter Phase III, the Honeymoon Stage. The abuser becomes nourishing and kind, apologizes for his abusive behavior, and promises it will never happen again.[57] Seeing a glimpse of the man she fell in love with, the victim tries desperately to believe the abuser, and feels responsible for his behavior and welfare.[58] The batterer's empty promises and kindness convince the victim to stay in the abusive relationship, and reinforce the abuser's perception of control.[59] As this third phase concludes, the cycle repeats, with the Honeymoon Stage becoming shorter and shorter.[60]

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47. Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 222 (2002); Gold, *supra* note 33, at 938.
48. *Theories About Abuse: The Cycle Theory of Battering*, TRANSITION HOUSE, http://www.transitionhouse.ca/THEORY.html (last visited Sept. 23, 2014), *archived at* http://perma.unl.edu/U724-VH2K [hereinafter *Cycle Theory of Battering*].
49. Gold, *supra* note 33, at 938.
50. Alison L. Weitzer, *The Revitalization of Battered Woman Syndrome as Scientific Evidence with the Enforcement of the DSM-5*, 18 MICH. ST. U. J. MED. & L. 89, 99 (2014).
51. *Cycle Theory of Battering*, *supra* note 48.
52. *Id.*
53. Gold, *supra* note 33, at 938.
54. Weitzer, *supra* note 50, at 99.
55. *Cycle Theory of Battering*, *supra* note 48.
56. Gold, *supra* note 33, at 938.
57. *Id.* at 939; *Cycle Theory of Battering*, *supra* note 48.
58. *Cycle Theory of Battering*, *supra* note 48.
59. Gold, *supra* note 33, at 939; *see* Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 145–46 (2000).
60. *Cycle Theory of Battering*, *supra* note 48; *see* Gold, *supra* note 33, at 939.

As the relationship deteriorates throughout this cycle of violence, between fifty and ninety percent of battered women attempt to leave their abuser.[61] These efforts are frequently frustrated by the abuser's violent response and the economic deprivation that accompanies separation.[62] Moreover, a period of heightened abuse can be triggered by ending the dating relationship, physical or legal separation, or divorce.[63] The abuser comprehends these acts as threatening his control over the victim, and may seek to regain his power through more violent abuse or killing.[64] Thus, regardless of whether a victim stays in the relationship or leaves, her experience with domestic violence "is terrifying and debilitating, and can rob her of all manner of trust, security, and hope."[65]

B. But Earl Walked Right Through That Restraining Order: Legal Responses to Domestic Violence

In light of the negative emotional, physical, and psychological effects domestic violence produces, women seeking to flee abusive relationships routinely turn to the legal and law enforcement systems for protection. Domestic disturbance calls constitute the largest category of complaints received by police departments annually,[66] and officers witness assaults in approximately one-third of those disturbances.[67] However, despite the victims' pleas for help, the legal definition of domestic violence has been substantially informed by the "conception of women as subordinated through force and the threat of force," and thus focuses disproportionately on physical abuse.[68] This limited spotlight restricts police and legal intervention, and employs an incident-based, rather than a control-based definition of domestic violence.[69] As such, victims whose abuse falls outside these bounds are

61. Kelly, *supra* note 24, at 354.
62. *Id.* "Domestic violence is cited as the primary cause of homelessness in many cities because victims who leave their abusers often have nowhere to go." MICHELLE L. MELOY & SUSAN L. MILLER, THE VICTIMIZATION OF WOMEN: LAW, POLICIES, AND POLITICS 122 (2011).
63. Carrie Chew, *Domestic Violence, Guns, and Minnesota Women: Responding to New Law, Correcting Old Legislative Need, and Taking Cues from Other Jurisdictions*, 25 HAMLINE J. PUB. L & POL'Y 115, 116 (2003).
64. *Id.* at 116–17; *see* SEAGER, *supra* note 31, at 30 ("Violence against women often escalates when the woman tries to leave an abusive relationship—this is when violent partners are most likely to turn to murder.").
65. Rosenthal, *supra* note 30.
66. Georgia v. Randolph, 547 U.S. 103, 126 (2006).
67. Adam W. Kersey, *Misdemeanants, Firearms, and Discretion: The Practical Impact of the Debate over "Physical Force" and 18 U.S.C. § 922(g)(9)*, 49 WM. & MARY L. REV. 1901, 1924 (2008).
68. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 3 (2012).
69. Kelly, *supra* note 24, at 357.

denied legal and judicial assistance, and prior incidents of violence tend to be concealed.[70]

The development of this passive legal framework traces its origins to the historical conception of domestic violence as a private, familial affair.[71] Interspousal immunity and the law of coverture granted a man authority over his wife's possessions and body, and "created a legal atmosphere that condoned domestic violence as a husband's tool for maintaining control over this 'property,' referring to his wife."[72] This attitude remained pervasive throughout the United States for decades and furthered the notion that familial violence was beyond the law's reach.[73] Shielded by this perception of privacy, violations against women became legally devalued as a function of gender stratification.[74]

In particular, the first law criminalizing domestic battery in the Western world was not passed until 1641.[75] Enacted by the Puritans of the Massachusetts Bay Colony, this law primarily served a symbolic function and was rarely enforced.[76] Legal remedies building on this initial statute occurred across the United States in waves, and "reflected the fact that violence in the private sphere was viewed more as a threat to social order than as injury to individual victims."[77] Specifically, these new legal responses showcased concerns about immigration, industrialization, and urbanization, and sought to both control and limit the behavior of "dangerous classes."[78] Female victims filing complaints for abuse under these laws faced extreme reluctance by

70. *See id.*
71. Eric A. Pullen, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "[S]imply Because Congress May Conclude that Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So.,"* 39 S. TEX. L. REV. 1029, 1045 (1998) ("Historically, domestic violence has been viewed as unfortunate private behavior by society and is designated noncriminal by the justice system."); *see also* Chew, *supra* note 63, at 120 (analyzing Minnesota laws on domestic abuse); Dwyer et al., *supra* note 38, at 68 ("Protected by the privacy of the family, the institution of marriage has been viewed as a license to abuse.").
72. Leroe-Muñoz & Roohparvar, *supra* note 20, at 313; *see* BUZAWA ET AL., *supra* note 19, at 54 ("Ancient historical precedents can therefore best be summarized by the concept of the natural inferiority of women, the natural authority of the male head of the household, and at its extreme, the 'property' rights of the head of the household over everyone in his domain.").
73. Leroe-Muñoz & Roohparvar, *supra* note 20, at 313–14.
74. MELOY & MILLER, *supra* note 62, at 5.
75. BUZAWA ET AL., *supra* note 19, at 56; MELOY & MILLER, *supra* note 62, at 39.
76. MELOY & MILLER, *supra* note 62, at 39; *see* SCHNEIDER, *supra* note 43, at 14 (noting that Puritans preferred to reconcile couples when there were complaints of abuse). Between 1633 and 1802, only twelve cases of battering were ever brought in Plymouth Colony. BUZAWA ET AL., *supra* note 19, at 57; GARCIA & MCMANIMON, *supra* note 42, at 70.
77. MELOY & MILLER, *supra* note 62, at 39.
78. *Id.* at 39–40.

the police and prosecutors to mete out justice.[79] These officials believed any adverse action against the husband would be detrimental to the female's economic situation.[80] Even when charged and convicted, however, batterers escaped with either impunity or a small fine.[81]

Legal decisions reflecting societal tolerance and ambivalence toward domestic violence continued throughout the nineteenth century.[82] It was not until the 1960s and 1970s that the stage for modern feminism was set.[83] Beginning in the 1960s, the battered women's movement gained traction, arising from the relentless work of feminists, activists, and battered women themselves.[84] Focusing primarily on the justice system's response to abused women, activists challenged the handling of domestic violence cases within the existing legal framework.[85] Drawing unparalleled attention to the problem of domestic abuse, feminists initiated a shift away from victim blaming and sparked a system-wide critique of governmental and judicial complicity in matters of interpersonal violence.[86] Specifically, individuals began questioning the allocation of state resources, and developed a deepened public concern for victims and social inequalities.[87] Victim advocates worked diligently during this time to expose inadequate criminal justice practices that failed to protect victims and hold offenders accountable.[88] Thus, from the beginning, activists highlighted the importance and centrality of legal change to the battered women's movement.[89]

Unfortunately, by the mid- to late-1970s, "it became apparent that formal legal modifications were not enough to guarantee actual change in the official response to woman battering."[90] Police officers continued to espouse a "hands off" policy, and were extremely reluctant to arrest male abusers.[91] Trained to act as mediators, police officers encouraged parties to "work it out" and removed the abuser

79. *Id.* at 39.
80. *Id.*
81. *Id.* at 40.
82. Lisa A. Frisch & Joseph M. Caruso, *The Criminalization of Woman Battering: Planned Change Experiences in New York State*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 104.
83. *See id.* at 107.
84. *Id.*; *see* Chew, *supra* note 63, at 120.
85. *See* Frisch & Caruso, *supra* note 82, at 109.
86. MELOY & MILLER, *supra* note 62, at 8.
87. *Id.*
88. *Id.* at 9.
89. *See* SCHNEIDER, *supra* note 43, at 44.
90. Frisch & Caruso, *supra* note 82, at 111.
91. Chew, *supra* note 63, at 120.

temporarily so he could "cool off."[92] These officers perceived interpersonal conflict as unsuited for police attention and inappropriate for prosecution.[93] As "gatekeepers of the criminal justice system," and the first point of contact for victims, police officers' failure to intervene nullified judicial reform and prevented victims from accessing legal remedies.[94] Activists quickly realized that "victims were the forgotten piece of the criminal act," and sought to alter the frontline responses to domestic violence.[95]

One of the first problems activists encountered was the inability of police officers to arrest an abuser for misdemeanor assault unless it was committed in the officer's presence.[96] This limitation required passage of stronger arrest policies, specifically in the form of pro-arrest statutes for domestic violence incidents.[97] Implementation of a pro-arrest policy enhances an officer's ability to make a warrantless arrest where the officer has not witnessed the assault.[98] Such policies further limit or remove police discretion over which abusers to arrest. The extent to which an officer's discretion is restricted depends on whether the policy implemented is one of mandatory arrest or presumptive arrest. Mandatory arrest policies completely eliminate an officer's choice where there is probable cause to believe that domestic violence has occurred, while presumptive arrest policies strongly guide the officer's use of discretion.[99] Mandatory arrest is favored by individuals who believe policy pronouncements in favor of arrest are insufficient to change an officer's response to domestic abuse.[100] These individuals further recognize that officers may lack sufficient domestic violence training to effectively respond to and analyze a domestic situation.[101] By removing an officer's free will, mandatory arrest policies ensure that all victims of domestic abuse receive equal and adequate treatment, and subject domestic abuse to "the harsh light of community scrutiny."[102] However, regardless of whether the

92. MELOY & MILLER, *supra* note 62, at 41; *see* GOODMARK, *supra* note 68, at 84 ("[T]he most common police response to a 'domestic call' was to advise the husband to take a walk around the block and cool down.").
93. Chew, *supra* note 63, at 120; *see* GARCIA & MCMANIMON, *supra* note 42, at 90 ("Throughout most of the twentieth century the *classic police response* to intimate partner violence was to avoid a dangerous and unpleasant situation by spending as little time as possible with these calls in order [to] engage in '*real police work*.'").
94. *See* MELOY & MILLER, *supra* note 62, at 40; GARCIA & MCMANIMON, *supra* note 42, at 87.
95. *See* MELOY & MILLER, *supra* note 62, at 15.
96. *Id.* at 41.
97. *Id.*
98. *See id.*
99. BUZAWA ET AL., *supra* note 19, at 191; SCHNEIDER, *supra* note 43, at 184.
100. BUZAWA ET AL., *supra* note 19, at 191.
101. *Id.* at 192.
102. GOODMARK, *supra* note 68, at 108.

policy is mandatory or presumptive, the pro-arrest attitude attempts to force a change in police behavior without first altering police attitudes.[103]

Armed with stronger police intervention, activists next sought to revamp the prosecution of domestic violence cases. "Prosecution was, if anything, rarer than arrest" in domestic abuse incidents and prosecution rates were "ridiculously low" prior to the late-1980s.[104] However, with the reconstruction of intimate partner violence as a widespread social problem, prosecutors began implementing no-drop policies.[105] No-drop policies permit prosecutors to pursue domestic violence cases without the cooperation of the victim.[106] Under these policies, victims do not have to face their abusers, and prosecutors rely on other evidence to satisfy their burden of proof.[107] This lack of victim testimony makes prosecution possible when victims become uncooperative during the criminal process.[108] Sometimes called evidence-based prosecution, the triumph of these no-drop policies thus depends on successful interaction and collaboration between the prosecutor and police.[109] While no-drop policies have been criticized for depriving victims of control over their relationships, they have nonetheless been credited with sending a strong message that domestic abuse will not be tolerated.[110]

In addition to no-drop policies, judicial branches began the widespread adoption of statutes and policies encouraging judges to issue injunctive orders and grant civil remedies to victims of abuse. Historically, the power to issue an injunctive order was considered ancillary to the court's substantive power of interpreting law and facts.[111] "Since the issuance of a protective order was not the court's primary purpose, judges have [traditionally] used injunctive orders sparingly."[112] However, since the 1980s, temporary restraining orders (TROs) and other injunctive devices have become some of the most

103. BUZAWA ET AL., *supra* note 19, at 192.

104. GOODMARK, *supra* note 68, at 86.

105. GARCIA & MCMANIMON, *supra* note 42, at 61.

106. MELOY & MILLER, *supra* note 62, at 43; GARCIA & MCMANIMON, *supra* note 42, at 115.

107. GARCIA & MCMANIMON, *supra* note 42, at 115. Other evidence can include 9-1-1 tapes, photographs, medical records, information gathered by social workers, testimony by witnesses to the abuse, and statements made to medical personnel concerning injuries. *Id.* at 116.

108. *Id.* at 115; *see* MELOY & MILLER, *supra* note 62, at 42–43.

109. GARCIA & MCMANIMON, *supra* note 42, at 115.

110. MELOY & MILLER, *supra* note 62, at 43.

111. BUZAWA ET AL., *supra* note 19, at 277.

112. *Id.*

frequently used legal remedies for battered women.[113] These legal mechanisms forbid the abuser from contacting, harassing, stalking, or injuring the victim.[114] While judges retain complete discretion over whether to grant a TRO, all fifty states and the District of Columbia have now enacted laws providing victims of domestic abuse access to courts through these injunctive devices.[115] It is estimated that between 600,000 and 700,000 permanent restraining orders are entered annually based on TROs and injunctive orders.[116]

An immense benefit of the protective order is that it affords the judicial system an opportunity for prospective intervention in cases of domestic abuse. Any violation of a protective order results in automatic criminal liability, and avoids the necessity of requiring proof of past abusive conduct beyond a reasonable doubt.[117] These orders further serve as a means of documenting abusive incidents, and constitute evidence should a case reach prosecution and adjudication.[118] Moreover, "because violation of an order is now a criminal offense in all states, the existence of the order itself provides a potent mechanism for police to stop abuse."[119]

Unfortunately, despite the benefits of protective orders, such rulings are only worth the paper they are written on. Police officers face significant obstacles attempting to enforce these orders of protection, and the effectiveness of this remedy has been relegated solely to the responsibility of law enforcement.[120] However, police officers have no constitutional obligation to enforce victims' injunctive orders.[121] Further supporting this notion of elusive enforcement is the fact that abusers contact approximately seventy-five percent of victims despite permanent no-contact orders.[122] Studies have also associated protec-

113. Albert R. Roberts, *Court Responses to Battered Women*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 97 [hereinafter Roberts, *Court Responses*].
114. *Id.* at 98.
115. BUZAWA ET AL., *supra* note 19, at 279; Leroe-Muñoz & Roohparvar, *supra* note 20, at 314.
116. BUZAWA ET AL., *supra* note 19, at 279.
117. *Id.* at 284; *see* Roberts, *Court Responses*, *supra* note 113, at 98 ("If the batterer violates any of the conditions of the protection order . . . he will be in contempt of court or guilty of either a misdemeanor or criminal offense.").
118. MELOY & MILLER, *supra* note 62, at 44.
119. BUZAWA ET AL., *supra* note 19, at 284.
120. MELOY & MILLER, *supra* note 62, at 44; Roberts, *Court Responses*, *supra* note 113, at 98; GARCIA & MCMANIMON, *supra* note 42, at 189 (noting that effective protection for victims of domestic violence requires police involvement and a willingness to enforce the orders).
121. *See generally* Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).
122. BUZAWA ET AL., *supra* note 19, at 295; GARCIA & MCMANIMON, *supra* note 42, at 124 (stating that over fifty percent of domestic violence protection orders are violated); Wardle, *supra* note 35, at 799 (claiming that fifty to sixty percent of all protective orders are violated within one or two years).

tive orders with increased violence and homicide, and there is typically little to no police intervention.[123] Regardless of these facts, however, civil protection orders are invaluable for the role they play in empowering victims of abuse.

Understanding this evolution of legal responses to domestic violence, it is unsurprising that the legal framework today is reactive and confined in nature. Although modern domestic violence can result in at least seven forms of legal action—civil protection orders, criminal prosecution, civil action for damages, divorce, custody disputes, spousal/child support, and actions against third parties—these remedies have limited effectiveness in actually *preventing* domestic abuse.[124] Many prosecutors continue to assign a low priority to domestic violence cases, especially those that require victim testimony and lack concrete physical evidence.[125] This emphasis on prosecuting only successful domestic violence cases "is at odds with the reality of intimate-partner assault, which is often a series of incidents that may reflect increasing seriousness, with little physical evidence and no witnesses."[126] Additionally, the no-drop policy strips the victim of control over her situation, and increases reluctance by victims to report abuse.[127] Of the cases that are successfully reported and prosecuted, most incidents are charged as misdemeanors, preventing offenders from building criminal histories that would influence an assessment of future dangerousness.[128] As such, domestic abusers are still not prioritized by the judicial system in the same manner as felons. Given the prevalence of plea bargaining, most offenders receive light sentences, little jail time, and have the conviction expunged from their record after completion of a domestic violence program. Thus, "[a] battered woman, upon confronting legal structures impermeable to her stories, learns that the criminal law does not go to the places of her suffering."[129]

C. If I Die Young: The Link Between Domestic Violence and Homicide

The legal system's failure to adequately address domestic violence can produce deadly results. Because domestic violence offenders are either acquitted or prosecuted under misdemeanor statutes, they are

123. GOODMARK, *supra* note 68, at 88.
124. Wardle, *supra* note 35, at 795, 800.
125. MELOY & MILLER, *supra* note 62, at 43.
126. *Id.* at 44.
127. *Id.* ("In sum, the reactive nature of the system means that many victims of intimate-partner violence do not ever come to the attention of legal authorities because they are reluctant to report the abuse.").
128. *Id.*
129. Deborah Tuerkheimer, *Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later*, 75 GEO. WASH. L. REV. 613, 624 (2007).

not subject to the same restrictions as felons with regards to purchasing and owning firearms.[130] In fact, half of the defendants who kill their spouses have criminal histories, typically in the form of misdemeanor abuse convictions.[131] Given the escalating nature of domestic violence, providing a convicted abuser with access to firearms is not only dangerous, it's lethal.[132]

Every month, forty-six women are shot and killed by an intimate partner.[133] Between 2001 and 2012, more women were murdered as a result of domestic violence than the number of soldiers killed in both Iraq and Afghanistan.[134] In 2005 alone, 678 women and 147 men were fatally shot by their intimate partners in the United States.[135] More recently in 2011, "there were 1,707 females murdered by males in single victim/single offender incidents," and ninety-four of these victims knew their killers.[136] Nationwide, firearms were the predominant weapon of choice in nearly two-thirds of all intimate partner murders.[137] This excessive use of guns in femicide is unique among industrialized nations, and American women are eleven times more likely to be murdered with a firearm than women in other high-income countries.[138]

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130. *See* Jones, *supra* note 38, at 97 (stating that arrest rates for domestic violence are as low as one out of every 100 acts of domestic abuse).

131. Kelly, *supra* note 24, at 363.

132. Burroughs, *supra* note 26; *see* Elizabeth Albright-Battles, *Fix the Law to Protect Women*, GAZETTE (July 30, 2014), http://thegazette.com/subject/opinion/guest-columnists/fix-the-law-to-protect-women-20140730, *archived at* http://perma.unl.edu/9KZK-Z2LY ("When we see innocent woman after innocent woman gunned down by abusive boyfriends and husbands, it becomes clear how badly our laws fail to protect our women.").

133. Leigh A. Caldwell, *Domestic Violence: The Next Front in Gun-Control Fight*, CNN (July 30, 2014), http://www.cnn.com/2014/07/30/politics/domestic-violence-and-guns, *archived at* http://perma.unl.edu/H62Y-CEHJ; *see also* Michele Richinick, *Senate Holds First-Ever Hearing on Guns and Domestic Violence*, MSNBC (July 30, 2014), http://www.msnbc.com/msnbc/senate-holds-first-ever-hearing-guns-and-domestic-violence, *archived at* http://perma.unl.edu/8AY3-AMYP (noting that forty-eight women are shot to death by intimate partners each month).

134. Caldwell, *supra* note 133; *see* Lauren Fox, *In Gridlocked Congress, Guns Are Back*, U.S. NEWS (July 29, 2014), http://www.usnews.com/news/articles/2014/07/29/senate-hearing-takes-on-domestic-violence-and-guns, *archived at* http://perma.unl.edu/3TFL-3HWS (claiming that more than 6,400 women were killed between 2001 and 2012 as a result of domestic violence).

135. United States v. Staten, 666 F.3d 154, 166 (4th Cir. 2011); *see also* United States v. Smith, 742 F. Supp. 2d 855, 868 (S.D.W. Va. 2010) (placing the cumulative number of victims shot and killed in 2005 as a result of domestic violence at over 800).

136. *Men Murder Women*, *supra* note 39, at 3.

137. DAVID ADAMS, WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS 256 (2007); *see also* Barasch, *supra* note 21 ("Guns are the most common weapon used in intimate partner homicides.").

138. ADAMS, *supra* note 137, at 256; McFadyen-Ketchum, *supra* note 18.

Additionally, the mere presence of a gun in a domestic assault situation increases the risk of death between seven- and twenty-fold.[139] The risk of homicide is further heightened where the abuser has previously threatened to kill or harm the victim with a weapon.[140] Faced with these daunting and realistic threats, women sometimes turn to firearms for protection against the abuser. However, "[w]hile two thirds of women who own guns acquired them primarily for protection against crime, the results of a California analysis show that purchasing a handgun provides no protection against homicide among women and is associated with an increase in their risk for intimate partner homicide."[141] Similar reports found that women murdered at the hands of an intimate partner were *more* likely to have purchased a handgun in the three years prior to their deaths.[142] These studies cast doubt on the longstanding notion of firearm protection, and illustrate the dangerous reality of handgun possession in an abusive relationship.

Moreover, although the rate of domestic violence murder has decreased by forty percent from 1970 to 2000, the killing of female victims has only moderately decreased from 1,600 per year to 1,300.[143] Paradoxically, it is the number of male victims that has decreased dramatically over this period, from 1,400 to 500.[144] Thus, despite the overall decrease in domestic violence homicide, female victims remain at-risk and vulnerable.

III. LOVE WITHOUT TRAGEDY: THE LAUTENBURG AMENDMENT ATTEMPTS TO SAVE WOMEN'S LIVES

Recognizing the lethal interplay between domestic abuse and firearms, Senator Frank R. Lautenberg sought to close a dangerous loophole in the federal Gun Control Act that allowed convicted domestic abusers to possess guns.[145] Proposed as a nationwide solution, the

139. Watts, Jr., *supra* note 20, at 236 ("In homes where guns are present the overall risk of homicide being committed by a family member or intimate partner is seven times greater than in homes where guns are not present."); Lalezari, *supra* note 21, at 295 (placing the increased risk of homicide at twenty-fold with the presence of a firearm); *see also* Karan & Stampalia, *supra* note 20, at 79 (stating that "[h]ouseholds with guns are almost eight times more likely to involve a firearm homicide by a family member or intimate acquaintance than homes without guns").

140. Chew, *supra* note 63, at 118 (noting that previous threats with a weapon increase the risk of death five-fold).

141. *Men Murder Women*, *supra* note 39, at 1 (internal citations omitted).

142. *Id.* at 1–2.

143. ADAMS, *supra* note 137, at 4.

144. *Id.*

145. *See* Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 528 n.8 (2003) ("Speaking in support of the Lautenberg Amendment, Senator Frank Lautenberg stated that, '[t]here is no question that the presence of a gun dramat-

Lautenberg Amendment supplemented the federal felon-in-possession law and extended the firearm ban to individuals convicted of misdemeanor crimes of domestic violence.[146] Specifically, 18 U.S.C. § 922(g)(9) makes it unlawful for any person convicted of a misdemeanor crime of domestic violence "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[147] A misdemeanor crime of domestic violence, in turn, is defined by 18 U.S.C. § 921(a)(33)(A)(ii) as having two elements. First, the offense must be a recognized misdemeanor under federal, state, or tribal law.[148] Second, the offense "must have, as one of its own elements, the use or the threatened use of physical force committed against an individual with whom the person is in a domestic relationship."[149] A domestic relationship includes a current or former spouse, parent or guardian of the victim, an individual with whom the victim shares a child in common, or a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian.[150] Through these statutory provisions, the Lautenberg Amendment acknowledges the reality that less severe forms of domestic abuse may evolve over time into homicide, and attempts to mitigate the special risks associated with this escalation by curbing firearm access.[151] Thus, § 922(g)(9) creates a permanent firearms disability for domestic violence misdemeanants.[152]

When faced with a Lautenberg Amendment case, the court must examine the conceptual elements of the predicate offense to determine whether the crime requires the use of physical force.[153] As such, the

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ically increases the likelihood that domestic violence will escalate into murder.'") (citation omitted); *see id.* at 529–30 ("The strong evidence of a link between domestic abuse and gun-related violence has led Congress to enact two statutes prohibiting domestic abusers from possessing firearms.").

146. John M. Skakun III, *Violence and Contact: Interpreting "Physical Force" in the Lautenberg Amendment*, 75 U. CHI. L. REV. 1833, 1833–34 (2008).

147. 18 U.S.C. § 922(g)(9) (2012).

148. *Id.* § 921(a)(33)(A)(ii) (2014); *see, e.g.*, United States v. Booker, 644 F.3d 12, 16 (1st Cir. 2011); Tanjima Islam, *The Fourth Circuit's Rejection of Legislative History: Placing Guns in the Hands of Domestic Violence Perpetrators*, 18 AM. U. J. GENDER SOC. POL'Y & L. 341, 344 (2010).

149. Islam, *supra* note 148, at 344 (referencing 18 U.S.C. § 921(a)(33)(A)(ii)); *see, e.g.*, *Booker*, 644 F.3d at 16; Skakun III, *supra* note 146, at 1833 (noting that any crime possessing the requisite relational element and use of physical force can qualify as a predicate offense).

150. 18 U.S.C. § 921(a)(33)(A)(ii).

151. *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1457 (2005) ("The firearms ban is designed to prevent the escalation of violence in domestic situations by taking firearms out of the hands of abusers.").

152. *See* Lininger, *supra* note 145, at 548.

153. Skakun III, *supra* note 146, at 1836.

facts underlying predicate offenses are irrelevant, and whether an individual is *actually* dangerous is never considered.[154] Instead, courts employ a categorical approach in which the charging papers are consulted to determine under which element(s) of the offense the defendant was convicted.[155] The defendant must have been charged under a statute involving the use of physical force for the conviction to qualify. However, misdemeanor crimes typically do not explicitly require the use of "physical force."[156] As such, the court must determine if physical force is an implicit element of the offense.[157] "To be an implicit element, 'physical force' must be 'a constituent part of the offense which must be proved by the prosecution in every case to sustain a conviction under a given statute.'"[158] Therefore, if the offense cannot be committed without using physical force, then physical force is an implicit element of the crime. Such force typically manifests in assault and battery convictions.[159]

Additionally, to sustain a Lautenberg conviction, the crime must have been committed against a domestic partner. Although this relational element appears straightforward, the Fourth Circuit created a judicial split when it required the domestic relationship to be a statutorily specified element of the predicate offense.[160] Prior to the Fourth Circuit's decision in *United States v. Hayes*, federal courts consistently rejected the argument that § 922(g)(9) mandated an explicit domestic relationship element.[161] In arriving at this conclusion, the courts afforded substantial weight to the plain language of the Lautenberg Amendment and Senator Lautenberg's intent to target widespread domestic abuse.[162] Particularly, courts noted that requiring a relational element would "lead to a significant practical anomaly" and "frustrate the clear purpose behind the law," which contemplated extending the firearm ban to *any person* convicted in *any court* of domestic violence.[163] Because fewer than half the states include relationship status as an element in a misdemeanor domestic

154. *Id.* at 1835.

155. *Id.* at 1836–37.

156. *Id.* at 1838.

157. *Id.*

158. *Id.* (emphasis omitted) (citations omitted).

159. *See, e.g.*, Skakun III, *supra* note 146, at 1852 ("Assault and battery are the core predicate crimes necessary to implement this idea—if abusers are convicted of a misdemeanor, as a matter of common sense it is likely to be assault or battery.").

160. *See* United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *rev'd*, 555 U.S. 415 (2009); Lalezari, *supra* note 21, at 296.

161. Jones, *supra* note 38, at 86; *see, e.g.*, United States v. Barnes, 295 F.3d 1354, 1365–66 (D.C. Cir. 2002); United States v. Meade, 175 F.3d 215, 220 (1st Cir. 1999).

162. Islam, *supra* note 148, at 346.

163. *Meade*, 175 F.3d at 220.

assault offense, the Lautenberg Amendment's effectiveness would be severely limited by the Fourth Circuit's approach.[164]

Agreeing with this rationale, the United States Supreme Court confirmed that a domestic relationship need not be an explicit element of the predicate offense.[165] Section 921(a)(33)(A) uses the world "element" in the singular, thus implying that Congress conceived of only *one* element in the requisite offense—use of physical force.[166] "Had Congress meant to make the [offender's relationship with the victim] an element of the predicate offense, it likely would have used the plural 'elements,' as it has done in other offense-defining provisions."[167] Additionally, a contrary outcome would be "awkward as a matter of syntax," requiring the Court to read the language "the use or attempted use of physical force, or the threatened use of a deadly weapon" as a phrase modified by the clause "committed by."[168] A person, however, cannot "commit" a "use," but rather "commits" an "offense."[169] Thus, the Court determined that an offense qualifies as a misdemeanor crime of domestic violence if it has, as an express element, the use of force or attempted or threatened use of a deadly weapon. The relationship requirement need only be part of the facts giving rise to the offense, not an element of the offense.[170]

Following a *conviction* for a misdemeanor crime of domestic violence, the Lautenberg Amendment operates as a self-executing sanction that requires the criminal to relinquish his weapons.[171] Refusal to turn over firearms is punishable by up to ten years in prison and a $250,000 fine.[172] For a conviction to qualify, however, the defendant must have been represented by counsel and tried by a jury, unless the individual knowingly and intelligently waived these rights or voluntarily pleaded guilty.[173] A defendant who appeals his conviction is still subject to the firearm ban until the conviction is vacated or overturned.[174] Absent this relief, there is nothing a convicted abuser can

164. *Id.*
165. *Hayes*, 555 U.S. at 421–22, 462.
166. *Id.* at 421.
167. *Id.* at 421–22.
168. *Id.* at 422; *see* 18 U.S.C. § 921(a)(33)(A).
169. *Hayes*, 555 U.S. at 422–23.
170. *See* Lalezari, *supra* note 21, at 296.
171. Mikos, *supra* note 151, at 1419; *see* Lininger, *supra* note 145, at 548 (explaining that only convictions, not indictments, trigger the Lautenberg Amendment).
172. Lininger, *supra* note 145, at 550.
173. 18 U.S.C. § 921(a)(33)(B)(i) (2012); Karan & Stampalia, *supra* note 20, at 80.
174. *See* Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 25, 27 ("If a previous conviction has been expunged or set aside, or if the person has been pardoned or accorded a full restoration of civil rights by the proper authority, the disability is removed.").

do to lift the firearm ban.[175] The ban is also retroactive, applying to convictions both before and after the law's enactment.[176] In this manner, the Lautenberg Amendment "picks up the slack left by state laws" that allow domestic violence crimes to be plea bargained to lesser offenses.[177]

Despite its laudable goal, passage of the Lautenberg Amendment was far from uncomplicated. Senator Lautenberg originally introduced the bill on March 21, 1996.[178] As proposed, the bill was straightforward and prohibited firearm possession by any person who had committed a "crime involving domestic violence."[179] The bill did not, however, "include any language requiring that certain 'elements' be present in the state statutes defining the predicate offense."[180] Critics argued that the term "crime of violence" was overbroad, as it could include mundane acts such as destroying credit cards or documents with scissors.[181]

After extensive compromise and alteration, Senator Lautenberg sought to incorporate his bill into the Anti-Stalking Act. The Anti-Stalking Act passed the House of Representatives without the Lautenberg Amendment in late May 1996.[182] However, Senator Lautenberg blocked a vote on the Anti-Stalking Act in the Senate until his proposed amendment was integrated.[183] The sponsor of the Anti-Stalking Act, Senator Kay Bailey Hutchinson (R-TX), refused, expressing concern that the Lautenberg Amendment's controversial content would prevent the Anti-Stalking Act from becoming law.[184] On July 25, 1996, after implementing additional changes, the legislation was incorporated into the Anti-Stalking Act by voice vote.[185]

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175. Mikos, *supra* note 151, at 1439.

176. Kelly, *supra* note 24, at 364; Pullen, *supra* note 71, at 1062.

177. Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. REV. 365, 378 (1999).

178. Kerri Fredheim, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. § 922(g)(9)*, 19 PACE L. REV. 445, 446 (1999); Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 510 (2008).

179. Lininger, *supra* note 145, at 551; *see also* Lalezari, *supra* note 21, at 311–12 ("When the Lautenberg Amendment was originally proposed, it used the broader term, 'crime of violence,' rather than the enacted version's 'use of physical force' language." (citation omitted)).

180. Lininger, *supra* note 145, at 552.

181. *Id.* at 554. *But see* Lalezari, *supra* note 21, at 312–13 (stating that Senator Lautenberg believed the credit-card-cutting scenario was farfetched, and that the statute would not be applied in that manner).

182. Pullen, *supra* note 71, at 1036.

183. *Id.*

184. *Id.*

185. Fredheim, *supra* note 178, at 446; Schneider, *supra* note 178, at 510; Lininger, *supra* note 145, at 552–53.

Following numerous delays with the Anti-Stalking Act, Senator Lautenberg reoffered his amendment in a last minute maneuver to the 1997 Treasury, Postal Service, and General Government appropriations bill.[186] Unfortunately, after twenty-five hours of debate, Republican Senator Trent Lott removed the legislation from the floor over disagreements on health care.[187] Prior to its removal, however, the Senate overwhelmingly approved the Lautenberg Amendment by a vote of 97 to 2.[188] Finally, on September 28, 1996, Senator Lautenberg successfully initiated his third attempt and attached the legislation to the 1997 Omnibus Consolidated Appropriations Act—a federal budget bill necessary to prevent a government shutdown.[189] Many in Congress were unaware of the amendment's existence due to Senator Lautenberg's decision to dispense with reading the bill's text.[190] As a result, neither the House nor the Senate held hearings on the Lautenberg Amendment, and there was no opportunity to discuss its constitutional ramifications.[191]

Despite its limited legislative history, the Lautenberg Amendment has withstood repeated constitutional challenges in federal courts. Such attacks have occurred on multiple fronts, including the Ex Post Facto Clause, the Fifth Amendment's notice and fair warning provision, the Due Process Clause, and the Tenth Amendment's guarantee of state sovereignty.[192] Additionally, critics condemn the law "as an overreaching of Congress's Commerce Clause authority, as an impermissible Bill of Attainder, and as an impermissible restriction on the right to bear arms guaranteed by the Second Amendment."[193] Federal courts, however, have dismissed these arguments, and found the Lautenberg Amendment to be a constitutional use of Congress's Commerce Clause powers.[194] In particular, courts note that § 922(g)(9)

186. 142 CONG. REC. S11877 (daily ed. Sept. 30, 1996) (statement of Rep. Lautenberg); Pullen, *supra* note 71, at 1037; Schneider, *supra* note 178, at 510–11.
187. Pullen, *supra* note 71, at 1037; Schneider, *supra* note 178, at 511.
188. 142 CONG. REC. S11877; Pullen, *supra* note 71, at 1037.
189. Schneider, *supra* note 178, at 511.
190. Pullen, *supra* note 71, at 1037–38.
191. *Id.* at 1037.
192. May, *supra* note 27, at 11; *see, e.g.*, United States v. Mitchell, 209 F.3d 319, 322–24 (4th Cir. 2000) (concluding that the Lautenberg Amendment does not violate either the Ex Post Facto Clause or the Due Process Clause of the Fifth Amendment); United States v. Lewitzke, 176 F.3d 1022, 1025–28 (7th Cir. 1999) (denying a challenge to the Lautenberg Amendment on the basis of the Fifth Amendment's Due Process Clause).
193. May, *supra* note 27, at 11 (citations omitted); *see, e.g.*, United States v. Emerson, 270 F.3d 203, 215–21 (5th Cir. 2001) (analyzing challenges to the Lautenberg Amendment under the Due Process Clause of the Fifth Amendment, the Commerce Clause, the Tenth Amendment, and the Second Amendment).
194. Elizabeth Coppolecchia et al., United States v. White*: Disarming Domestic Violence Misdemeanants Post-*Heller, 64 U. MIAMI L. REV. 1505, 1507 (2010) ("Section 922(g)(9) contains specific language that connects the provision to interstate

contains specific language requiring the firearm be possessed "in or affecting commerce" or received after having "been shipped or transported in interstate or foreign commerce."[195] This language sets the Lautenberg Amendment apart from predecessor firearm and domestic violence legislation, which lacked this jurisdictional element.[196]

In addition to these constitutional challenges, the Lautenberg Amendment has faced extreme criticism for its universal applicability to *all* individuals, including law enforcement officers, government employees, and military personnel.[197] The lack of exemption for police, government, and military officers makes the Lautenberg Amendment different in kind and degree from the Gun Control Act of 1968, which excused these officials from the firearm ban.[198] Particularly, the Gun Control Act allowed police and military officers to retain their firearms as part of their employment, even if convicted of a crime of domestic violence.[199] However, the Lautenberg Amendment prohibits these same individuals from possessing weapons, even if such weapons are a necessary component of their job.[200] As such, the Lautenberg Amendment supersedes the Gun Control Act's public interest exception in an effort to reduce the carnage that domestic violence produces.[201] Thus, the Lautenberg Amendment seeks to provide

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commerce, and lower courts have upheld the statute as a valid exercise of Congress's power to regulate interstate commerce."); *see, e.g.*, Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 822 (S.D. Ind. 1998) ("In light of the overwhelming weight of precedent, we find that § 922(g)(9) is a proper exercise of Congress' power under the Commerce Clause."); Nat'l Ass'n of Gov't Emp., Inc. v. Barrett, 968 F. Supp. 1564, 1572 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir. 1998) (stating that § 922(g)(9) contains a jurisdictional element that provides the requisite nexus between interstate commerce and federal regulation).

195. 18 U.S.C. § 922(g)(9) (2012); *see Barrett*, 968 F. Supp. at 1572 (identifying the Lautenberg Amendment's nexus with interstate commerce).

196. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990 as an impermissible use of Congress' Commerce Clause power); United States v. Morrison, 529 U.S. 598 (2000) (finding that the civil remedy afforded in the Violence Against Women Act exceeded the bounds of congressional authority). Polly Pruneda even argues that Congress included the statutory jurisdictional element in a purposeful attempt to evade any Commerce Clause problems. Pruneda, *supra* note 22, at 841; *see also* Coppolecchia et al., *supra* note 194, at 1507 (explaining that the judicial holding of *United States v. Morrison* "likely prevented Congress from legislating in the area of domestic violence without some direct connection to interstate commerce").

197. Nelson, *supra* note 177, at 366–67.

198. *See id.* at 366–67, 370; Ashley G. Pressler, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT. 705, 710 (1999).

199. Nelson, *supra* note 177, at 370–71.

200. *Id.*

201. Jessica A. Golden, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementational Flaws*, 29 FORDHAM URB. L.J. 427, 429–40 (2001).

a proactive solution to domestic violence homicide in which no individual is above the law.

IV. ONE HIT LEADS TO ANOTHER: INTERPRETING THE LAUTENBURG AMENDMENT'S "PHYSICAL FORCE" REQUIREMENT

While controversy over passage of the Lautenberg Amendment still exists, the most recent attacks have focused on the legislation's textual vagueness, particularly with regard to the "physical force" requirement. Although § 921(a)(33)(A)(ii) requires that a predicate offense have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," the term "physical force" is never defined.[202] Courts have thus been tasked with determining the degree of force necessary for a misdemeanor to qualify as a predicate crime of domestic violence. Such responsibility resulted in a circuit split, which required Supreme Court resolution in early 2014.

A. Love Is a Battlefield: The Circuit Split

Among the courts that have interpreted the physical force requirement, the First, Eighth, Ninth, Tenth, and Eleventh Circuits have espoused conflicting interpretations. In particular, the First, Eighth, and Eleventh Circuits (collectively, the "Expansive Courts") held that simple assault and battery convictions suffice as predicate offenses under the Lautenberg Amendment.[203] In contrast, the Ninth and Tenth Circuits (collectively, the "Restrictive Courts") concluded that a generic assault and battery statute criminalizing unlawful touching did not require physical force for completion, and thus, did not fall within the scope of the Lautenberg Amendment. This section briefly details the relevant appellate cases and sets the stage for the Supreme Court's necessary intervention.

As early as 1999, the Eighth Circuit espoused one of the first appellate interpretations of the term "physical force" in the context of § 921(a)(33)(A)(ii)'s domestic violence requirement. William Maurice Smith (Smith) pleaded guilty to simple misdemeanor assault under Section 708.1(1) of the Iowa Code, which criminalizes "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another."[204] Following a subsequent firearms violation, the government charged Smith with illegal possession of a gun as a domestic violence convict

202. 18 U.S.C. § 921(a)(33)(A)(ii) (2012).
203. *See* United States v. Nason, 269 F.3d 10 (1st Cir. 2001); United States v. Smith, 171 F.3d 617 (8th Cir. 1999); United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006).
204. *Smith*, 171 F.3d at 619–20; IOWA CODE ANN. § 708.1(1) (West 2003).

pursuant to § 922(g)(9).[205] In concluding that Smith's assaultive conduct qualified as a predicate misdemeanor crime of domestic violence, the Eighth Circuit found the plain text of Section 708.1(1) of the Iowa Code to have, as an element, the use or attempted use of force, and did not condition this decision on the degree of force employed.[206]

Expanding on this analysis three years later, the First Circuit interpreted Maine's general-purpose assault statute to determine whether the "offensive physical contact" prong involved the use or attempted use of physical force.[207] Authorities in Maine filed a criminal complaint against Robert Nason (Nason) for intentionally, knowingly, or recklessly causing bodily injury or offensive physical contact to his wife in contravention of Title 17-A, Section 20 of the Maine Revised Statutes.[208] Less than two years later, Nason pawned a rifle and then redeemed it, violating § 922(g)(9).[209] Looking first at the standard definitions of "physical force," the First Circuit defined the concept as "elementary" and "readily understood."[210] Reasoning that a straightforward application of the term precluded ambiguity, the court inferred that Congress did not intend to engraft a bodily injury requirement into § 921(a)(33)(A)(ii).[211]

The First Circuit further bolstered its reasoning by examining 18 U.S.C. § 922(g)(8), which immediately precedes § 922(g)(9). Section 922(g)(8)(C)(ii) includes a qualifying clause that limits its reach specifically to crimes involving "the use, attempted use, or threatened use of physical force . . . that would reasonably be expected *to cause bodily injury*."[212] Unable to dismiss this limiting clause as mere surplusage, the court interpreted the lack of a "bodily injury" requirement in § 922(g)(9) as purposeful.[213] This language differential, according to the court, "means that we must read the unqualified use of the term 'physical force' in section 922(g)(9) as a clear signal of Congress's intent that section 922(g)(9) encompass misdemeanor crimes involving *all* types of physical force, regardless of whether they could reasonably be expected to cause bodily injury."[214] This interpretation comports with Senator Lautenberg's intention to broaden the spectrum of predicate offenses covered by § 922(g)(9).[215] Thus, the court found Nason's

205. *Smith*, 171 F.3d at 619.
206. *Id.* at 620–21.
207. *Nason*, 269 F.3d at 11.
208. *Id.* at 12; *see also* ME. REV. STAT. ANN. tit. 17-A, § 207 (2001) ("A person is guilty of assault if . . . [t]he person intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another person.").
209. *Nason*, 269 F.3d at 12.
210. *Id.* at 16.
211. *Id.*
212. 18 U.S.C. § 922(g)(8)(C)(ii) (2012) (emphasis added).
213. *Nason*, 269 F.3d at 16–17.
214. *Id.*
215. *Id.* at 17.

conviction under Maine's general assault statute to qualify as a predicate offense despite the lack of violence or bodily injury.

Most recently, the Eleventh Circuit supplemented this reasoning in 2006, when it used the dictionary definition of "physical force" to analyze Georgia's criminal battery statute. Jerry Griffith (Griffith) pleaded guilty to two counts of simple battery in August 2000, after he beat his wife and dragged her across the floor in violation of Section 16-5-23(a) of the Georgia Code.[216] Pursuant to Section 16-5-23(a), "[a] person commits the offense of simple battery when he or she either: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) Intentionally causes physical harm to another."[217] Following this incident, authorities found Griffith illegally in possession of a firearm, and charged him under § 922(g)(9).[218]

Employing the same categorical approach as the First and Eighth Circuits, the Eleventh Circuit analyzed the raw text of Section 16-5-23(a) to determine whether "physical contact of an insulting or provoking nature" necessarily involved the requisite physical force to serve as a predicate offense under § 922(g)(9).[219] Looking first at dictionary definitions, the Eleventh Circuit defined physical force as "[p]ower, violence, or pressure directed against a person consisting in a physical act."[220] Under this definition, a person would be unable to make physical contact of an insulting or provoking nature without exerting *some* minimal level of force.[221]

Additionally, the Eleventh Circuit examined the significance of the limiting language in § 922(g)(8)(C)(ii), and concluded that Congress intentionally omitted "bodily injury" from § 922(g)(9). According to the court, "[i]f Congress had wanted to limit the physical force requirement in § 922(g)(9), it could have done so, as it did in the last clause of the preceding paragraph of the same subsection. . . . That it did not speaks loudly and clearly."[222] Imposing a level of force requirement (i.e., "violent") on § 922(g)(9) would run afoul of common sense and constitute impermissible statutory remodeling.[223] Thus, the Eleventh Circuit found the Georgia statute sufficient to serve as a predicate offense under § 922(g)(9).

In direct contrast to the Expansive Courts' decisions, the Ninth and Tenth Circuits held that the physical force to which § 922(g)(9)

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216. United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006).
217. GA. CODE ANN. § 16-5-23(a) (2005).
218. *Griffith*, 455 F.3d at 1340.
219. *Id.* at 1341.
220. *Id.* at 1342 (internal quotation marks omitted).
221. *Id.*
222. *Id.*
223. *See id.* at 1343–45.

and § 921(a)(33)(A)(ii) refer is not *de minimis*.[224] In *United States v. Belless*, authorities charged Robert Belless (Belless) with violating Wyoming's general assault and battery statute, Section 6-2-501(b) of the Wyoming Statutes, after he grabbed his wife by the chest and neck and pushed her angrily against a car.[225] This statute makes it unlawful for any individual to unlawfully touch another in a rude, insolent, or angry manner, or "intentionally, knowingly or recklessly cause bodily injury to another person by use of physical force."[226] Six years later, Belless was indicted for felony possession of a firearm under § 922(g)(9).[227]

Interpreting this Wyoming statute, the Ninth Circuit found that the statutory language encompasses conduct that does not necessarily involve the use or attempted use of physical force. According to the court, "[a]ny touching constitutes 'physical force' in the sense of Newtonian mechanics," but the federal statute commands more than *technical* force.[228] The associated phrase in § 921(a)(33)(A)(ii) is "threatened use of a deadly weapon," which imposes a heightened danger requirement.[229] As such, the physical force at issue in the federal definition is *violent* force against the body of another individual, not merely *any* force.[230] The Wyoming statute, however, criminalizes behavior that is minimally forcible and ungentlemanly, and embraces conduct outside the scope of § 921(a)(33)(A)(ii).[231] Thus, the Wyoming statute cannot serve as the necessary predicate offense for § 922(g)(9).

Analyzing the same Wyoming statute five years later, the Tenth Circuit echoed the Ninth Circuit's reasoning and held that Wyoming's battery statute did not categorically satisfy the definition of a "misdemeanor crime of domestic violence."[232] Defining "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim," the Tenth Circuit articulated that *some* degree of power or violence must be present to constitute physical force.[233] Any number of "touchings" or indirect contact might be considered "rude" or "insolent" under the Wyoming statute, but would not rise to the necessary level of physical force under § 921(a)(33)(A)(ii).[234] While the Expansive Courts may be scientifically correct in their definition

224. *See, e.g.*, United States v. Belless, 338 F.3d 1063 (9th Cir. 2003), *abrogated by* United States v. Castleman, 134 S. Ct. 1405 (2014); United States v. Hays, 526 F.3d 674, 677 (10th Cir. 2008).
225. *Belless*, 338 F.3d at 1065.
226. WYO. STAT. ANN. § 6-2-501(b) (2014); *Belless*, 338 F.3d at 1067.
227. *Belless*, 338 F.3d at 1065.
228. *Id.* at 1067.
229. *Id.* at 1068.
230. *Id.*
231. *Id.*
232. United States v. Hays, 526 F.3d 674, 679 (10th Cir. 2008).
233. *Id.* at 677 (quoting BLACK'S LAW DICTIONARY 673 (8th ed. 2004)).
234. *Id.* at 679.

of "physical force," they nonetheless collapse the distinction between violent and non-violent offenses.[235] This error could give federal statutes similar to § 922(g)(9) an overly broad scope and impact.[236]

Moreover, the legislative history of § 922(g)(9) indicates a limited application to episodes of violent physical force. The Tenth Circuit explained:

> Indeed, during the debate of the bill that later became 18 U.S.C. § 922(g)(9), one of the sponsoring senators referred repeatedly to "wife beaters" and "child abusers," and also to "people who engage in *serious* spousal or child abuse," "those who commit family *violence*," and "people who show they cannot control themselves *and are prone to fits of violent rage*," suggesting that the concern was with violent individuals rather than those who have merely touched their spouse or child in a rude manner.[237]

Additional legislative comments make clear the statute's purpose was confined to domestic abusers who previously fell outside the bounds of the federal firearm ban because they were convicted of lesser offenses due to plea bargains or outdated thinking.[238] This legislative intent did not extend to *de minimis* physical contact, but rather only encompassed violent episodes of rage and anger. Thus, the Tenth Circuit's decision reinforced the Ninth Circuit's holding and heightened the judicial divide regarding the requisite level of force necessary to constitute a "misdemeanor crime of domestic violence." Therefore, in an effort to resolve this judicial disagreement, the Supreme Court granted certiorari in the case of *United States v. Castleman* on October 1, 2013.

B. Stuck in the Middle with You: The Supreme Court's Unprecedented Ruling on Domestic Violence

The Supreme Court's grant of certiorari and oral argument in *Castleman* occurred during a politicized period in which Congress sought to expand the prohibition list of domestic violence offenses to include temporary protective orders and stalking crimes.[239] The Obama administration added further fuel to the fire, claiming that affirming the Restrictive Courts' holding would render the Lautenberg Amendment largely inoperative and nullify similar laws throughout the states.[240] Media outlets professed that the wrong decision "could leave abused

235. *Id.* at 681.
236. *Id.*
237. *Id.* at 679–80 (quoting 142 CONG. REC. S8831–06 (1996)).
238. *Id.* at 680.
239. *US Supreme Court to Review Existing Gun Ban for Domestic Abusers*, RT (Oct. 2, 2013), http://rt.com/usa/scotus-gun-ban-domestic-abusers-656/, *archived at* http://perma.unl.edu/38WZ-EU7X.
240. *Id.*; *see High Court Bolsters Domestic Violence Gun Ban Law*, YAHOO NEWS (Mar. 26, 2014), http://news.yahoo.com/high-court-bolsters-domestic-violence-gun-ban-law-153041067—politics.html, *archived at* http://perma.unl.edu/PA95-Q5PU.

women and children vulnerable to gun violence and impose serious costs on communities across the country."[241] With the stakes "extraordinarily high,"[242] the Supreme Court issued one of its most activist decisions to date on the topic of domestic violence.

1. *I Knew You Were Trouble: Background and Procedural Posture of* United States v. Castleman

James Castleman (Castleman) pleaded guilty to misdemeanor assault in violation of Tennessee Code Section 39-13-111(b) on July 16, 2001.[243] This Tennessee statute imposes criminal liability on any defendant who intentionally or knowingly causes bodily harm to a domestic abuse victim.[244] Castleman's indictment acknowledged the satisfaction of these statutory elements, and disclosed that Castleman physically injured the mother of his child.[245] Pursuant to the Lautenberg Amendment, this conviction permanently barred Castleman from purchasing or selling firearms.

Approximately seven years later, however, federal authorities discovered Castleman dealing firearms on the black market. Castleman's wife purchased the firearms under her name and turned the weapons over to her husband for sale.[246] Given Castleman's prohibition from purchasing or possessing firearms, the prosecutor indicted Castleman on two counts of illegal firearm possession pursuant to § 922(g)(9). The district court dismissed these claims on April 30, 2010, finding that Castleman's misdemeanor domestic assault conviction did not qualify as a predicate offense because it did not require the "use or attempted use of force" as defined in § 921(a)(33)(A)(ii).[247] In so holding, the district court "rejected the construction adopted by other circuits . . . under which a domestic assault conviction resulting from 'subtle and indirect uses of physical force' would permit liability under § 922(g)(9)."[248] Rather, the district court reasoned that Tennessee Code Section 39-13-111(b)(1) permitted a conviction for non-physical assaultive conduct, which fell outside the bounds of § 922(g)(9).[249] Following this ruling, the government moved for reconsideration and timely appealed to the Sixth Circuit.

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241. McFadyen-Ketchum, *supra* note 18; *see* Burroughs, *supra* note 26 ("If the Supreme Court upholds the lower courts' interpretation of the gun ban, it will immensely cripple the law and the protection it affords.").
242. McFadyen-Ketchum, *supra* note 18.
243. United States v. Castleman, 134 S. Ct. 1405, 1409 (2014); United States v. Castleman, 695 F.3d 582, 584 (6th Cir. 2012).
244. TENN. CODE ANN. § 39-13-111(b) (2014); *see id.* § 39-13-101.
245. *Castleman*, 695 F.3d at 584.
246. *Id.*
247. *Id.*
248. *Id.* at 584–85.
249. *Id.* at 585.

A divided panel of the Sixth Circuit affirmed the district court's holding by different reasoning. Using principles of statutory interpretation, "[t]he majority held that the degree of physical force required by § 921(a)(33)(A)(ii) is the same as required by § 924(e)(2)(B)(i), which defines violent felony."[250] Specifically, the Sixth Circuit noted:

> Section 921(a)(33)(A)(ii) defines a "misdemeanor crime of domestic violence" as a crime that "has, as an element, the use or attempted use of physical force," against a victim with whom the defendant shares a domestic relationship. Like § 921(a)(33)(A)(ii), §§ 16(a) and 924(e)(2)(B)(i) use the phrase "physical force to define "crime of violence" and "violent felony," respectively. Section 16(a) defines a "crime of violence" in part as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." For its part, § 924(e)(2)(B)(i) defines a "violent felony" in part as a crime "that has as an element the use, attempted use, or threatened use of physical force." By defining a "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force," § 921(a)(33)(A)(ii) drops the reference to "threatened use" from §§ 16(a) and 924(e)(2)(B)(i) but otherwise tracks the language of §§ 16(a) and 924(e)(2)(B)(i). The provisions' similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force.[251]

Thus, the Sixth Circuit concluded that *violent* force was necessary to sustain a conviction for a misdemeanor crime of domestic violence pursuant to § 922(g)(9).

Employing this strategic framework, the Sixth Circuit next addressed whether Castleman's particular crime under Tennessee Code Section 39-13-111(b) qualified as a misdemeanor crime of domestic violence. Relying on precedent from *United States v. McMurray*,[252] which held that a Tennessee aggravated assault conviction was not a predicate offense under § 924(e)(2)(B)(i), the majority answered in the negative. In particular, the majority explained that § 39-13-111(b) only criminalizes the infliction of bodily injury, which can be achieved without the use of violent force.[253] "Therefore, a defendant could violate Tennessee Code Section 39-13-111(b) both in a manner that constitutes a 'misdemeanor crime of domestic violence' and in a manner that does not."[254] Because Castleman's indictment did not provide a basis from which to identify the degree of force used, the Sixth Circuit refused to categorize his assault as involving the use of violent force. This ruling deepened the preexisting circuit split, and the United States timely appealed.

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250. United States v. Castleman, 134 S. Ct. 1405, 1409 (2014).
251. *Castleman*, 695 F.3d at 586.
252. 653 F.3d 367 (6th Cir. 2011).
253. *Castleman*, 695 F.3d at 590.
254. *Id.*

2. You Give Love a Bad Name: The Supreme Court Reverses

On March 26, 2014, the United States Supreme Court issued a seemingly huge victory for domestic violence victims. Authored by Justice Sonia Sotomayor, the 9–0 decision represented a triumph for gun control groups and victim assistance advocates.[255] Although perceived by some as a "distinctly feminist decision on domestic violence law," media outlets praised the opinion for forcing individuals to recognize the unique manner in which power and position can transform a single act of violence over time.[256] By categorizing routine battery convictions as sufficient to trigger the federal gun ban, the Court crafted an expansive definition of domestic violence to address the real harms committed within homes and relationships.

The Court began its analysis with an interpretation of the term "force," as used in § 921(a)(33)(A)(ii). Resorting to the term's widely accepted common law definition, the Court quickly held that "force" encompassed all offensive touchings against another individual.[257] Specifically, the Court distinguished precedent from *Johnson v. United States*, in which the Justices defined the term "violent felony" under the Armed Career Criminal Act (ACCA).[258] Comparable to a misdemeanor crime of domestic violence, a violent felony has, as an element, the use of physical force.[259] The Court, however, declined to read the common law definition of "force" into the ACCA's definition of "violent felony" because it was a "comical misfit with the defined term."[260] Rather, to comport with the statute's plain text, a violent felony necessarily requires *violent* physical force.[261] But, in the case of a misdemeanor crime of domestic abuse, the term "violent" is conspicuously absent. Thus, the common law meaning of "force" as even the slightest offensive touching fits perfectly with the statute's plain language.[262]

255. *See* Richard Wolf, *Supreme Court Upholds Gun Ban for Domestic Violence*, USA TODAY (Mar. 26, 2014, 4:35 PM), http://www.usatoday.com/story/news/nation/2014/03/26/supreme-court-guns-domestic-violence/6918457/, *archived at* http://perma.unl.edu/S6TP-J4PE; *see also* David G. Savage, *Supreme Court Keeps Guns Away from Those Guilty of Domestic Violence*, LA TIMES (Mar. 26, 2014, 7:27 PM), http://www.latimes.com/nation/la-na-court-guns-20140327-story.html, *archived at* http://perma.unl.edu/6RT7-5HNH (reporting on the Supreme Court disposition in *U.S. v. Castleman*).

256. Alexandra Brodsky, *SCOTUS Recognizes Expansive Definition of Domestic Violence*, FEMINISTING (Mar. 28, 2014), http://feministing.com/2014/03/28/scotus-recognizes-expansive-definition-of-domestic-violence/, *archived at* http://perma.unl.edu/Y4ML-EQ3T.

257. United States v. Castleman, 134 S. Ct. 1405, 1410 (2014).

258. *Id.*; Johnson v. United States, 559 U.S. 133 (2010).

259. 18 U.S.C. § 924(e)(2)(B)(i) (2014).

260. *Johnson*, 559 U.S. at 145.

261. *Id.* at 140.

262. *Castleman*, 134 S. Ct. at 1410.

Furthermore, the Court found compelling public policy and legislative rationales for applying the broad definition of force to misdemeanor crimes of domestic violence.[263] First, the Court analyzed the typical prosecution cycle of domestic violence offenses. Because perpetrators of domestic abuse are routinely charged and prosecuted under general state assault and battery laws, the level of force used to support a common-law battery conviction should logically apply to a misdemeanor crime of domestic violence.[264]

Second, the Court outlined the inherent differences between domestic violence and other forms of non-partner abuse. Explaining that domestic assault is simply a "type of violence," the Court recognized that domestic abuse may occur in a non-violent context.[265] Such non-violent physical force may include hitting, slapping, shoving, biting, and hair pulling. Instead of focusing on the amount of violence used against the victim, the Court identified that domestic violence is an accumulation of hurtful acts over time that subject a victim to an abuser's cycle of power and control.[266] Thus, prosecution for a seemingly minor act in the context of an intimate partner relationship does not offend the common sense definition of misdemeanor crime of domestic violence.

Third, the Court found "no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with others whom § 922(g) disqualifies from gun ownership."[267] Unlike the ACCA, which classifies a defendant convicted of a violent felony as an armed career criminal, a misdemeanor crime of domestic violence charge does not warrant such designation.[268] Domestic abusers would therefore suffer no further repercussions from their classification under the statute.

Finally, the Court noted that any alternative interpretation of the term "force" under § 921(a)(33)(A)(ii) would have rendered § 922(g)(9) inoperative in numerous States at the time of its enactment.[269] Specifically, most local assault and battery statutes prohibit either (1) both offensive touching and acts that cause bodily injury, or (2) solely acts that result in bodily harm. Thus, statutes that criminalize mere offensive touching would fall outside the scope of § 922(g)(9), rendering § 922(g)(9) ineffective in at least ten states (constituting nearly

263. *Id.* ("The very reasons we gave for rejecting that meaning [of force] in defining a 'violent felony' are reasons to embrace it in defining a 'misdemeanor crime of domestic violence.'").
264. *Id.* at 1411.
265. *Id.* at 1412.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 1413.

thirty percent of the nation's population).[270] For these combined reasons, the Court held that the common law definition of "force" must be applied to misdemeanor crimes of domestic violence.

Applying this definition of "force" to the Tennessee statute, the Court determined that Castleman was convicted of a crime that had, as an element, the use or attempted use of force. Adopting a modified categorical approach, the Court consulted Castleman's indictment to determine under which provision of Section 39-13-111(b) of the Tennessee Code he pled guilty.[271] According to the Court, Castleman pleaded guilty to having "intentionally or knowingly cause[d] bodily injury," and this intentional causation of harm necessarily involves the use of physical force.[272] In particular, the term "bodily injury" under Tennessee law is broad, encompassing cuts, abrasions, bruises, burns, physical pain, temporary illnesses, and disfigurements.[273] These forms of injury all entail the use of physical force, bringing them within the ambit of § 921(a)(33)(A)(ii). It is impossible to cause any form of bodily injury without applying or exerting force in the common law sense.[274]

Having concluded its plain language interpretation of § 921(a)(33)(A)(ii) and § 922(g)(9), the Court next dismissed Castleman's non-textual arguments. Castleman relied heavily on the legislative history of § 922(g)(9), arguing that the primary purpose of the statute was to address *serious* spousal abuse by violent individuals. In support of this argument, Castleman quoted Senators Lautenberg, Hutchison, Wellstone, and Feinstein, who referred to "serious spousal or child abuse," "violent individuals," "people who batter their wives," people who "brutalize" their significant others, and "severe and recurring domestic violence" during the passage of § 922(g)(9).[275] The Court, however, focused extensively on § 922(g)(9)'s overarching purpose, which was to keep guns out of the hands of domestic abusers. Thus, "nothing about these Senators' isolated references to severe domestic violence suggests that they would not have wanted § 922(g)(9) to apply to a misdemeanor assault conviction like Castleman's."[276]

The Court was similarly unmoved by Castleman's constitutional rights argument and invocation of the rule of lenity. In a single paragraph, Castleman argued that § 922(g)(9) mandates a narrow construction because of its Second Amendment implications. However, because Castleman did not articulate a facial or as-applied challenge

270. *Id.*
271. *Id.* at 1414.
272. *Id.*
273. TENN. CODE ANN. § 39-11-106(a)(2) (1997); *see Castleman*, 134 S. Ct. at 1414.
274. *Id.* at 1414–15.
275. *Id.* at 1415; *see* 142 CONG. REC. 22985–22986, 22988 (1996).
276. *Castleman*, 134 S. Ct. at 1415.

to the constitutionality of § 922(g)(9), the Court sidestepped the issue.[277] Finally, the Court summarily dismissed Castleman's rule of lenity argument by identifying its inapplicability to § 922(g)(9). Particularly, the rule of lenity only applies if there is grievous statutory ambiguity or uncertainty such that the Court must guess at Congress's intent.[278] This was not the case under § 922(g)(9)'s current statutory scheme.

3. Can't Fight This Feeling Anymore: The Two Concurring Opinions

Although the Supreme Court's ruling in *Castleman* was unanimous, three Justices disagreed with the majority's rationale and penned two concurring opinions on separate grounds. Justice Antonin Scalia "managed to fit in some of his classic conservative hysteria," and used narrower grounds to reach the same conclusion as the majority.[279] Beginning his response with an analysis of *Johnson*, Justice Scalia advocated giving "physical force" the same definition as under the ACCA in § 924(e)(2)(B)(i).[280] Both the ACCA and § 922(g)(9) are designed to enhance public safety by prohibiting specific classes of criminals from possessing firearms.[281] The physical force clauses in both statutes are nearly identical, and the presumption of common usage suggests that a term generally possesses the same meaning each time it is used.[282] Thus, "[i]t would be surpassing strange" to give two similar statutes different and contradictory meanings.[283]

The expansive definition of domestic violence used by the majority, however, ignores this precedent and statutory text. The Supreme Court has twice addressed the meaning of physical force in the context of violent crimes, and both times concluded that it applies solely to *violent* force.[284] The majority's position that *any* common-law offensive touching constitutes physical force is therefore in direct opposition to judicial precedent and common sense.[285]

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277. *Id.* at 1416; *see* Adam Liptak, *Sweeping Ruling on Domestic Violence*, N.Y. TIMES (Mar. 26, 2014), http://www.nytimes.com/2014/03/27/us/justices-view-gun-curbs-broadly-in-domestic-violence-cases.html?_r=0, *archived at* http://perma.unl.edu/Y84Z-YYRN.

278. *Castleman*, 134 S. Ct. at 1416.

279. Brodksy, *supra* note 256; *see Castleman*, 134 S. Ct. at 1417–22 (Scalia, J., concurring in part and concurring in judgment).

280. *Castleman*, 134 S. Ct. at 1417 (Scalia, J., concurring in part and concurring in judgment).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*; *see* Johnson v. United States, 559 U.S. 133, 140 (2010); Leocal v. Ashcroft, 543 U.S. 1, 11 (2004).

285. *See Castleman*, 134 S. Ct. at 1417–18.

Furthermore, applying the consistent and precedential definition of physical force used in the ACCA would not have rendered § 922(g)(9) inoperative or a practical nullity, as argued by the majority. Excluding non-violent offensive touchings, § 922(g)(9) would have been applicable in at least four-fifths of the States.[286] Thirty-eight of the forty-eight states that had misdemeanor assault or battery statutes included the use of violent force within their scope.[287] Approximately nineteen of the statutes covered infliction of bodily injury, not offensive touching, and the remaining nineteen statutes prohibited both offensive touching and bodily injury.[288] These latter nineteen statutes, however, encompassed both forms of harm in a divisible manner, such that a court could identify the basis for a conviction by inspecting the charging documents.[289] Thus, only ten states would have been excluded from the scope of § 922(g)(9).

Moreover, Justice Scalia examined the definitions of domestic violence in effect at the time the statute was enacted. These dictionaries and authorities defined domestic violence as possessing the same meaning as ordinary violence, but occurring within a domestic setting.[290] Indeed, Congress even defined the term "crime of domestic violence" as a "crime of violence" in a separate provision of the same bill that enacted § 921(a)(33)(A)(ii).[291] The majority, however, ignored these authorities and relied on various definitions of domestic abuse submitted in an amicus brief filed by the National Network to End Domestic Violence, and two publications produced by the Department of Justice's Office on Violence Against Women.[292] These sources are problematic, given that the organizations can define domestic violence in any manner they wish.[293] By relying on improper definitions of domestic abuse, the majority distorted the law and impoverished the statute's plain language. Therefore, according to Justice Scalia, the level of force required to constitute a misdemeanor crime of domestic violence must be force capable of causing physical pain or bodily injury.[294] Yet, despite this fundamental dispute with the majority, Justice Scalia nonetheless found that Castleman's conviction invoked the requisite amount of physical force to constitute a misdemeanor crime of domestic violence, and concurred in the judgment.

Similarly, Justice Samuel Alito and Justice Clarence Thomas concurred solely with the majority's judgment. Disagreeing that a misde-

286. *Id.* at 1418.
287. *Id.* at 1419.
288. *Id.*
289. *Id.*
290. *Id.* at 1420.
291. *Id.* at 1419–20.
292. *Id.* at 1420–21.
293. *Id.* at 1421.
294. *Id.* at 1422.

meanor crime of domestic violence incorporates the well-established common law meaning of "force," Justices Alito and Thomas declined to extend the reasoning of *Johnson* to the issues in *Castleman*.[295] Specifically, the two Justices noted that the *Johnson* Court intentionally reserved judgment on a similar question presented, and, therefore, its analysis should have been deemed inapplicable in the case at bar.[296]

V. CAN'T BUY ME LOVE: AN ANALYSIS OF *CASTLEMAN* AND SUGGESTED STRATEGIES FOR PROSECUTORS AND DEFENSE ATTORNEYS

The tone of the Court's opening paragraph left no doubt as to the remainder of its ruling. Resorting to statistics and persuasive rhetoric, Justice Sotomayor boldly introduced her audience to the perils of domestic violence. By immediately tugging on the public's sympathies, the Court diverted speculation away from the merits of its argument and gained justification through emotions and empathy. This introductory analysis of domestic violence—although tangentially related to the Court's argument—served primarily as a form of sly manipulation designed to predispose citizens to accept its holding. The majority's reasoning, however, is fundamentally flawed, and this section begins by unveiling the blatant activism present in the majority's opinion. This section then tackles the pressing question of whether *Castleman* and pending legislative efforts can successfully wage war against domestic violence. Answering this question in the negative, the Article advocates for non-legal intervention and progressive educational programs to target potential domestic violence abusers in their formative years. Finally, this section offers strategic advice for both prosecutors and defense attorneys in light of *Castleman*.

A. 'Cause I Like It That Way: Using Judicial Activism to Protest Domestic Violence

The Supreme Court's decision in *Castleman*, while perceived as a glowing victory for the Obama administration and domestic rights advocates, is unfortunately misguided and incorrect. Ignoring potent precedent regarding the definition of physical force, Justice Sotomayor molded the law into an activist weapon to use in the fight against domestic violence. The majority's opinion in *Castleman*, no matter how well-intentioned, serves as yet another example of the Court bending the law to its will. By adopting a broad interpretation of physical force, the Court violated legal precedent and defined the same term differently in similarly worded statutes.

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295. *Id.* (Alito, J., concurring in judgment).
296. *Id.*

As Justice Scalia aptly observed, the Court has twice fashioned a definition for "physical force"—once in *Johnson v. United States* and again in *Leocal v. Ashcroft*. In *Johnson*, the Court was tasked with determining whether the Florida offense of battery had, as an element, the use of physical force sufficient to constitute a violent felony under § 924(e)(2)(B)(i) of the ACCA.[297] Similar to § 921(a)(33)(A)(ii), § 924(e)(2)(B)(i) does not define the phrase "physical force." Thus, the Court applied the term's ordinary meaning.[298] The adjective "physical," while clear in meaning, was unhelpful in determining the level of force required to constitute a violent felony. Rather, the Court focused extensively on the noun "force," which has a number of specialized definitions. According to the Court, "force" means:

> "[S]trength or energy; active power, vigor; often an unusual degree of strength or energy" . . . "[p]ower, violence, compulsion, or constraint exerted upon a person." Black's Law Dictionary 717 (9th ed. 2009) (hereinafter Black's) defines "force" as "[p]ower, violence, or pressure directed against a person or thing." And it defines "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim."[299]

All of these definitions "suggest a degree of power that would not be satisfied by the merest touching."[300]

However, the Court noted that a specialized legal definition of the word "force" exists, casting doubt on these dictionary interpretations. Referring to the common law meaning of "force," which encompasses even the slightest offensive touching, the Court explicitly confronted the issue of whether this common law definition superseded the dictionary analysis. In ruling against the common law interpretation, the Court explained that context determines meaning, and common law definitions should not be implanted where they plainly do not make sense.[301] Here, the Court was interpreting the phrase "violent felonies," and concluded that the slightest offensive touching would be contradictory to the term's plain language.[302] Thus, the Court required the use of violent physical force to satisfy § 924(e)(2)(B)(i).[303]

Similarly, in *Leocal*, the Court examined the term "crime of violence" as used in 18 U.S.C. § 16.[304] Section 16(a) defines a crime of violence as an offense having as an element the use of physical force against the person or property of another.[305] Honing in on the context of the statute, the Court found it critical that the phrase "*use* of force"

297. Johnson v. United States, 559 U.S. 133, 135 (2010).
298. *Id.* at 138.
299. *Id.* at 139 (citation omitted).
300. *Id.*
301. *Id.* at 139–40.
302. *Id.* at 140.
303. *Id.*
304. Leocal v. Ashcroft, 543 U.S. 1 (2004).
305. 18 U.S.C. § 16(a) (2014).

implies active employment.[306] This holding removed all reckless and negligent conduct from the ambit of § 16. Furthermore, the Court determined that an ordinary meaning of the phrase "crime of violence" "suggests a category of violent, active crimes."[307] Therefore, the Court imposed heightened mens rea and force requirements to ensure the statutory purpose of § 16 was satisfied.

In the domestic violence context, no rationale exists for departing from this well-established Supreme Court precedent. First, the Court has addressed almost identical statutory language twice, and held that the common law definition of force was insufficient both times. Second, although the Court never previously analyzed the use of physical force in the context of a misdemeanor, the circumstances surrounding the enactment of § 921(a)(33)(A)(ii) and § 922(g)(9) suggest that a heightened level of force is required. The Lautenberg Amendment was originally enacted to close the dangerous loophole of *felony* domestic violence abusers plea bargaining to *misdemeanor* offenses.[308] The law was never intended to target minimal abuse insufficient to trigger a felony statute at the outset. The majority opinion misinterprets this legislative intent underlying the Lautenberg Amendment, and incorrectly applies the federal gun ban to *all* levels of domestic abuse.

In light of Supreme Court precedent and the fundamental purpose of the Lautenberg Amendment, the Court should have held that domestic violence crimes sufficient to trigger the federal gun ban require *violent* physical force, not mere offensive touching. Under this framework, a domestic violence misdemeanant should only lose his firearm rights if he employs force sufficient to trigger a felony domestic violence charge. A domestic abuser whose actions solely amount to a misdemeanor does not implicate the Lautenberg Amendment, as he is not plea bargaining to escape the federal firearms ban. There are few material differences between being charged with one misdemeanor and plea bargaining to a separate misdemeanor.

The Court's decision, however, ignored the stated purpose of the Lautenberg Amendment in favor of an activist approach against domestic violence. Viewing *Castleman* as the appropriate vehicle to crack down on domestic abusers, the Court took advantage of an opportunity to protect domestic violence victims. While such action is commendable, manipulating the law in this manner exceeds the bounds of Supreme Court review. This explicit judicial activism represents "a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the pub-

306. *Leocal*, 543 U.S. at 10–11.
307. *Id.* at 11.
308. Fredheim, *supra* note 178, at 501.

lic."[309] Such result-oriented decision-making "is truly unforgiveable," and the Constitution mandates that the legislature effectuate these policy changes, not the courts.[310] *Castleman* thus serves as a representative case in which the Supreme Court's heart overruled its head. This disregard for precedent, however, earned the Supreme Court favorable media coverage and many perceive this opinion as critical for helping to permanently end abuse.

B. My Knight in Shining Armor Turned Out to Be a Loser in Aluminum: Why *Castleman* and Pending Legislative Initiatives Will Not Reduce Domestic Violence and Why Education is Critical in the Fight Against Domestic Abuse

Although the press widely praised *Castleman* as a landmark decision adopting a progressive stance against domestic violence, the undeniable reality remains that *Castleman* is simply a piece of paper. The Court's decision in *Castleman*, while symbolic of shifting attitudes towards domestic abuse, merely establishes a heightened standard under which domestic abusers may be prosecuted. The opinion brings additional domestic violence perpetrators within the scope of § 922(g)(9), but does little to actually address the underlying societal patterns that create such abuse. Rather, the Supreme Court has espoused a decision that relies heavily on law enforcement officers and prosecutors to implement, without considering the unique burdens increased domestic violence cases will place on already crowded court dockets. Furthermore, the opinion fails to evaluate the underlying efficiency and success of § 922(g)(9) as a realistic and workable remedy for domestic violence victims. This section explores why *Castleman* will likely not have an appreciable impact on the lives of domestic violence victims, and evaluates the downfalls of pending legislative initiatives.

Fundamentally, although § 922(g)(9) purports to save women's lives, prosecutions under the statute have been disappointingly low. During its first year of enactment in 1996, only one prosecution occurred under § 922(g)(9), and there were only ten prosecutions in 1997.[311] While these numbers steadily increased over subsequent years, eventually reaching 159 prosecutions in 2000, the total number of § 922(g)(9) prosecutions total only two to three percent of all prosecutions under 18 U.S.C. § 922(g) for illegal possession of firearms.[312]

309. Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 555 (2010).
310. Barrera v. State, 982 S.W.2d 415, 418 (Tex. Crim. App. 1998) (en banc) (Baird, J., dissenting); *see* Siegel, *supra* note 309, at 563.
311. Lininger, *supra* note 145, at 532.
312. *Id.*

"The low rate of prosecution under section 922(g)(9) is alarming given early predictions that one million potential defendants would meet the requirements for prosecution under this statute."[313]

In addition to the statute's low prosecution statistics, the referral rate for domestic violence misdemeanants who are found in possession of firearms is abysmal. Between 2000 and 2002, for example, the total number of suspected domestic violence offenders in possession of firearms totaled 18,653.[314] Of these misdemeanants, only 630 were referred to U.S. Attorneys for prosecution—a mere 3.4 percent.[315] This embarrassing referral rate is further downgraded and compounded by the serious enforcement problems that persist under § 922(g)(9). According to the General Accounting Office, between 1998 and 2001, at least 3,000 domestic violence misdemeanants subject to the federal gun ban were able to acquire *new* guns from federally licensed dealers.[316] "Thus, for every one person prosecuted under section 922(g)(9), ten more bought new guns in so conspicuous a manner that their purchases could be documented by federal investigators."[317] These statistics greatly call into question the effectiveness of § 922(g)(9), and highlight its blatant inefficiencies in protecting domestic violence victims.

Yet, despite § 922(g)(9)'s troubled and limited enforcement, recent legislative efforts concentrate extensively on broadening the scope of abusers who are subject to the firearms ban in § 922(g)(9).[318] These congressional initiatives seek to include stalkers and abusive dating partners within the category of perpetrators for whom the federal gun ban applies.[319] Specifically, Senator Amy Klobuchar (D-MN) proposed legislation that attempts to subject a new category called "non-intimate dating partners" to the federal gun ban.[320] Serving as an amendment to the Brady Handgun Violence Prevention Act, the Klobuchar Bill (titled *Protecting Domestic Violence and Stalking Victims Act of 2013*) intends to revise the definition of an "intimate partner" to include dating partners, and seeks to criminalize the use or

313. *Id.*; *see* Kersey, *supra* note 67, at 1920 ("Considering that 11 percent of all reported and unreported violence results from family violence, intuition suggests that the number of convictions under 18 U.S.C. § 922(g)(9) would be substantial.").
314. Kersey, *supra* note 67, at 1920.
315. *Id.*
316. Lininger, *supra* note 145, at 532.
317. *Id.*
318. *See* Richinick, *supra* note 133.
319. *See id.*; *see also* Caldwell, *supra* note 133 (reporting on legislative efforts to expand gun restrictions for domestic abusers).
320. Dennis Santiago, *Guns in America: What's Up with Domestic Violence in the Senate?*, HUFFINGTON POST (July 31, 2014, 1:43 PM), http://www.huffingtonpost.com/dennis-santiago/guns-in-america-whats-up_b_5638545.html, *archived at* http://perma.unl.edu/9HHH-PPLS.

attempted use of physical force by a dating partner.[321] The bill further prohibits the sale or disposition of a firearm to any person who has been convicted of a misdemeanor crime of stalking.[322]

The problem with this bill and similar initiatives, however, is that § 922(g)(9) has proven ineffective at appreciably reducing firearm sales to current domestic violence perpetrators. Broadening the scope of an already flawed and unworkable statute will have no meaningful effect on discouraging domestic violence crimes. Additionally, due process concerns are implicated because ex parte restraining orders are routinely granted without a defendant's presence. While the defendant may appear at a ten-day hearing and contest the restraining order, the rules of evidence are frequently disregarded, and such civil actions do not normally culminate in a trial. Rather, a judge will make a decision on the defendant's right to possess a gun solely based on one civil hearing that does not involve proof or evidence. Whereas an individual charged with a misdemeanor crime of domestic violence must be legally convicted before he loses his firearm rights, the Klobuchar bill would permanently remove gun possession for individuals who are subject to a *civil* restraining order that does not encompass the evidentiary standard of beyond a reasonable doubt. Surely, the protections of the Second Amendment are not such that they can be disposed of by a mere civil hearing.[323]

This recent legislative action, coupled with the enforcement limitations of § 922(g)(9) begs the obvious question: *How* do we effectively stop domestic violence? While the law is a key element in advancing a vision of ending violence against women, it cannot be the central focus. Despite the enormous strides in gender equality over the decades, the reality remains that women live in a patriarchal society. Societal expectations demand that men exhibit strong, powerful, and masculine qualities while women should be reserved, kind, and obedient.[324] Powerful and independent women challenge this societal balance and trigger shame in men who appear weak in comparison. The humiliation and stigma that attach to men perceived as powerless and fragile is an underlying trigger in the cycle of violence. Yet, when such pervasive emphasis is placed on individual offenders and victims,

321. Protecting Domestic Violence and Stalking Victims Act of 2013, S. 1290, 113th Cong. (2013), *archived at* http://perma.unl.edu/4HJZ-5WTF.

322. *Id.*

323. *See* Brief for Gun Owners Foundation et al. as Amici Curiae Supporting Respondent at 22, United States v. Castleman, 134 S. Ct. 1405 (2014) (No. 12-1371).

324. Lisa Firestone, *Why Domestic Violence Occurs and How to Stop It*, HUFFINGTON POST (Oct. 22, 2012, 4:26 PM), http://www.huffingtonpost.com/lisa-firestone/domestic-violence-awareness_b_2000652.html, *archived at* http://perma.unl.edu/UV7E-YSCT.

"little attention has been paid to identifying and modifying the structural and cultural sources of abusive behavior."[325]

With this gender imbalance ingrained in individuals throughout their formative childhood years, it is unrealistic to expect abusers to alter their behavior as a result of short domestic violence intervention programs or imprisonment. These legal remedies, aimed at halting the *immediate* threat of violence against victims, do little for long-term prevention of domestic abuse.[326] Rates of domestic violence have not dramatically declined since the inception of legal reforms in the United States, but rather have kept pace with the overall declining crime rate.[327] The police and prosecution systems are disappointingly incident-driven, and this nature is incompatible with the complexity of abuse.[328] By filtering the societal response to domestic violence through the criminal justice system, the government effectively equates intimate partner abuse with discrete assault, and encourages police officers and prosecutors to measure the seriousness of the assault by the level of injury inflicted.[329] As previously noted, this approach ignores the repetitive and escalating cycle of harassment and abuse that domestic violence victims endure. Thus, the criminal justice system and corresponding legal structures are systematically biased to address only individual specific acts of abuse, not the harrowing and ongoing violence that victims endure daily.[330]

Rather than rely on a largely reactive legal system to curb intimate partner violence, society must address abuse in non-confrontational and educational settings that begin in elementary school.[331] Educational intervention is one of the only prevention programs that does not rely exclusively on criminal punishment, and these educational initiatives have been repeatedly urged by domestic violence task forces.[332] For example, positive results have been reported for Safe Dates, a school and community initiative that includes a ten-session

325. BUZAWA ET AL., *supra* note 19, at 2; *see* MELOY & MILLER, *supra* note 62, at 4 ("Looking at the underlying context of the situation is often beyond the interest or scope of an investigation by a criminal justice system that favors efficiency and frowns on ambiguity."); *see also* GOODMARK, *supra* note 68, at 157 ("Law does not fundamentally alter the structural conditions that create the context for abuse.").

326. *See* BUZAWA ET AL., *supra* note 19, at 8 ("Mounting evidence suggests that criminal justice intervention alone has a limited effect on the size and nature of the domestic violence problem . . . .").

327. GOODMARK, *supra* note 68, at 154–55.

328. MELOY & MILLER, *supra* note 62, at 44, 66.

329. BUZAWA ET AL., *supra* note 19, at 11.

330. *See id.* at 31.

331. *See* Rocky Robinson, *Domestic Violence—We Must Continue to Educate*, HOUS. LAW., Sept.–Oct. 2004, at 6, *archived at* http://perma.unl.edu/UGL6-VCWA.

332. MELOY & MILLER, *supra* note 62, at 169–70.

educational curriculum, theater production, and poster contest.[333] Eighth and ninth grade students participating in this program have reported less physical dating violence and victimization in the immediate four years following the program than a similarly situated control group.[334] The underlying conceptual framework of this program centers on decreasing gender stereotypes and challenging norms associated with partner violence.[335] Thus, Safe Dates highlights the rewards of early intervention and demonstrates that effective domestic violence remedies must be based on undermining societal gender constructs that depict women as inferior and males as controlling, masculine figures.

Additionally, targeting domestic violence during childhood development is key given that a majority of women are victimized and raped before the age of eighteen.[336] By educating men and women from a young age about the perils of domestic abuse, society can help individuals create and recognize healthy relationships. These educational initiatives may also serve as a catalyst for undermining the prevalence of patriarchy in society. Society must alter its baseline cultural attitudes if it hopes to appreciably reduce and end domestic violence.

C. The Heart of the Matter: Strategies for Prosecutors and Defense Attorneys

Regardless of the overwhelming need for educational intervention to tackle domestic abuse, the fact remains that domestic violence will continue to be addressed at the legislative and legal levels for the foreseeable future. Given this reality, it is important for prosecutors and defense attorneys to understand their strategic positions in light of *Castleman* and the evolving domestic violence framework. Facially, prosecutions for misdemeanor crimes of domestic violence appear straightforward: combine one part general assault or battery with one part domestic relationship, and a misdemeanor crime of domestic violence is born. Despite its facial simplicity, however, strategic tactics and maneuvers exist for prosecutors and defense attorneys to strengthen their respective chances of conviction and acquittal. This

333. WORLD HEALTH ORG., PROMOTING GENDER EQUALITY TO PREVENT VIOLENCE AGAINST WOMEN 5 (2009), *archived at* http://perma.unl.edu/Y6TJ-J36Y; Linda Chamberlain, *A Prevention Primer for Domestic Violence: Terminology, Tools, and the Public Health Approach*, VAWNET, http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=1313 (last accessed Nov. 22, 2014), *archived at* http://perma.unl.edu/28JL-3YJP.

334. WORLD HEALTH ORG., *supra* note 333, at 5; Chamberlain, *supra* note 333.

335. Chamberlain, *supra* note 333; ANN ROSEWATER, PROMOTING PREVENTION, TARGETING TEENS: AN EMERGING AGENDA TO REDUCE DOMESTIC VIOLENCE 14 (2003), *archived at* http://perma.unl.edu/W33J-RPUH.

336. MELOY & MILLER, *supra* note 62, at 170.

section offers guidance for criminal case development, and explores potential techniques to enhance negotiation power at the plea bargaining table.

1. You Don't Mess Around with Jim: Prosecutorial Strategies

The prosecutorial response to *Castleman* should focus on maximizing the effectiveness of the federal firearms prohibition as a pertinent tool to disarm domestic abusers. To the extent possible, prosecutors must ensure that batterers are charged with and convicted of offenses that qualify as misdemeanor crimes of domestic violence. Achieving this goal requires extensive attention to the compilation of criminal complaints, indictments, and charging instruments. Specifically, prosecutors must ensure the charging documents specify the precise act(s) a defendant is charged with committing, and include all statutory elements in an unambiguous and clear manner.[337] This attention to detail is particularly necessary when faced with a divisible statute, i.e., a statute in which one offense qualifies as a misdemeanor crime of domestic violence but the remaining portion of the statute does not.[338] Generic allegations in a criminal complaint may preclude a judge from determining under which statutory section the defendant was charged, and prevent his conviction from serving as a predicate offense under § 922(g)(9).

Additionally, prosecutors must ensure the charging documents allege—and the evidence supports—a domestic relationship between the defendant and the victim.[339] Although a domestic relationship is not a separate element of the predicate offense, the Supreme Court nonetheless held that it must be proved beyond a reasonable doubt in a § 922(g)(9) prosecution.[340] Including a description of the domestic relationship in the charging documents "will facilitate identification of convictions that will trigger the prohibition against possession of firearms."[341] This is particularly useful in jurisdictions whose definition of "domestic violence" includes relationships that do not fall within the scope of § 922(g)(9).[342]

Furthermore, it is critical that the criminal complaint allege *purposeful* and *intentional* conduct. The Supreme Court has not yet addressed the issue of whether reckless or negligent physical harm qualifies as the "use of physical force." As discussed more fully in the

337. Teresa M. Garvey, *Disarming the Batterer:* United States v. Castleman, STRATEGIES IN BRIEF (AEQUITAS, D.C.) Sept. 2014 at 1, 3, *archived at* http://perma.unl.edu/LW8H-GMZP.
338. *See id.*
339. *Id.* at 4.
340. United States v. Hayes, 555 U.S. 415, 421 (2009).
341. Garvey, *supra* note 337, at 4.
342. *Id.*

section on defensive tactics, it is unlikely that reckless conduct is sufficient to support a common law battery conviction and serve as a predicate offense.[343] Prosecutors must therefore take care to include the highest mens rea supported by the evidence.[344] There should never be ambiguity as to a defendant's mental state when attempting to convict under § 922(g)(9). Thus, it is the prosecutor's responsibility to collaboratively interact with the investigating police officers when preparing the charging documents, and ensure that a mens rea of purposeful or intentional conduct can be alleged and supported in court. The inability to prove intentional or purposeful conduct will likely preclude charging a defendant as a domestic violence misdemeanant.

Finally, when faced with plea bargain negotiations, prosecutors should not permit domestic abusers to plead guilty to lesser included offenses that do not qualify as misdemeanor crimes of domestic violence.[345] Allowing plea bargains to include general assault and battery convictions that do not implicate the federal gun ban would circumvent the purpose of the Lautenberg Amendment, which is to close a dangerous loophole that allows domestic abusers to plead guilty to misdemeanor charges instead of felonies. Where a prosecutor possesses sufficient evidence to support an assault or battery, a domestic relationship, and intentional or purposeful conduct, it is irresponsible to allow the defendant to plead guilty to any lesser crime that does not include a firearms ban. Despite their overwhelmingly busy dockets, prosecutors must give priority to domestic violence cases that implicate § 922(g)(9) in order to effectuate the purpose of the Lautenberg Amendment and keep victims safe. Plea bargains for domestic abuse cases under § 922(g)(9) should be limited only to circumstances in which the defendant agrees to a firearms ban with the lesser included offense. The defendant's refusal to acquiesce should preclude further plea bargain negotiations.

2. Not Ready to Make Nice: Defensive Tactics

In contrast to the prosecution's strategies, defense attorneys should endeavor to undercut the prosecution's evidence regarding mens rea and the existence of a domestic relationship. Because the prosecution bears the burden of proof beyond a reasonable doubt, defense attorneys may simply expose holes in the prosecution's arguments and easily remove the case from § 922(g)(9)'s grasp. The most obvious argument for defense attorneys centers on divisible assault or battery statutes and ambiguous charging documents. If the charging

343. *See* discussion *infra* Part IV.C.2.
344. *See* Garvey, *supra* note 337, at 3–4.
345. *See generally id.* at 4.

documents and criminal complaint do not explicitly set forth the statutory provision under which the defendant is charged, a conviction may not be sustained under § 922(g)(9) if the statute also encompasses conduct outside the scope of § 922(g)(9). The lack of specificity in the charging documents is a saving grace for defense attorneys, and provides significant negotiating power at the bargaining table.

Additionally, defense attorneys have a strong argument that *Castleman* does not encompass the *reckless* use of physical force. The only express requirements for a predicate offense under § 922(g)(9) are that it: (1) was a misdemeanor; (2) had, as an element, the use or attempted use of force; and (3) was committed against an intimate domestic partner.[346] These elements do not specify or imply a particular mens rea.[347] In the absence of an express mental state, courts must give terms their ordinary and natural meaning.[348] Although the First Circuit in *United States v. Booker* and *United States v. Armstrong* held that a common interpretation of the phrase "*use* of physical force" includes reckless and intentional conduct, the Supreme Court recently cast considerable doubt on these holdings.[349] In footnote 8 of *Castleman*, the Supreme Court noted that the "use" of force requires *active* employment rather than negligent or reckless conduct.[350] While the Court did not directly address the issue of recklessness in *Castleman*, it stated that Courts of Appeals decisions since *Leocal* have almost uniformly held that recklessness is insufficient to constitute the "use" of force.[351] These Circuit Courts reason that because recklessness is defined as the conscious disregard of a substantial and unjustifiable risk, it is more akin to negligence than the *intentional* use of force.[352] Although *Leocal* addressed "use of physical force" in the context of 18 U.S.C. § 16, it is not a stretch for defense attorneys to analogize § 16 to § 921(a)(33)(A)(ii), given their identical terminology.[353]

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346. United States v. Booker, 644 F.3d 12, 18 (1st Cir. 2011).
347. *Id.*
348. *Id.*
349. *Id.* at 18–21; United States v. Armstrong, 706 F.3d 1, 4–5 (1st Cir. 2013), *vacated*, 134 S. Ct. 1759 (2014); United States v. Castleman, 134 S. Ct. 1405, 1414 n.8 (2014).
350. *Castleman*, 134 S. Ct. at 1414 n.8.
351. *Id.*; *see, e.g.*, United States v. Palomino Garcia, 606 F.3d 1317, 1335–36 (11th Cir. 2010); Jimenez-Gonzalez v. Mukasey, 548 F.3d 557, 560 (7th Cir. 2008); United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008); United States v. Torres-Villalobos, 487 F.3d 607, 615–16 (8th Cir. 2007); United States v. Portela, 469 F.3d 496, 499 (6th Cir. 2006); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1127–32 (9th Cir. 2006) (en banc); Garcia v. Gonzales, 455 F.3d 465, 468–69 (4th Cir. 2006); Oyebanji v. Gonzales, 418 F.3d 260, 263–65 (3d Cir. 2005); Jobson v. Ashcroft, 326 F.3d 367, 373 (2d Cir. 2003); United States v. Chapa-Garza, 243 F.3d 921, 926 (5th Cir. 2001).
352. *Palomino Garcia*, 606 F.3d at 1336.
353. *Compare* 18 U.S.C. § 16(a) (2014) ("[T]he term 'crime of violence' means . . . an offense that *has as an element the use, attempted use, or threatened use of physi-*

Moreover, the Supreme Court in *Castleman* articulated that not every assault under Tennessee Code Section 39-13-101 involves the use or attempted use of physical force. Specifically, the Court warned that the reckless causation of bodily injury might not qualify as the "use" of force.[354] In light of this decision, the Court vacated the First Circuit's holding in *Armstrong*, and remanded the case for reconsideration in light of *Castleman*.[355] Subsequently, on April 30, 2014, the First Circuit issued an opinion in the case of *United States v. Carter*, where it acknowledged that the Supreme Court's decision "casts doubt" on whether reckless conduct constitutes the use of physical force.[356] The First Circuit determined that the validity of a conviction under Maine's general-purpose assault statute likely depends on which mens rea prong served as the basis for the guilty plea and conviction.[357] While not expressly overruling its decisions in *Booker* and *Armstrong*, the First Circuit nonetheless established a strong foundation for their reversal. When the District of Maine reconsidered *Carter* upon remand, it held that the defendant potentially pleaded guilty to an offense with a mens rea of recklessness, and that such an offense could not serve as a predicate misdemeanor crime of domestic violence under § 922(g)(9).[358] Thus, defense attorneys possess continuously evolving sources of precedent that undermine the application of reckless conduct to misdemeanor crimes of domestic violence.

Furthermore, defense attorneys may add creativity to this argument by using the direct language of *Castleman*. Specifically, *Castleman* held that the requirement of "use of physical force" is satisfied by the degree of force that supports a common law battery conviction. The strategic and creative argument for defense attorneys thus comes down to whether an individual may commit common law battery by recklessly causing physical harm or contact. Defense attorneys should analyze the particular wording of the state statute under which the defendant was charged, and may assert a compelling argument that the battery statute does not criminalize reckless conduct.

Finally, defense attorneys should scrutinize the nature of the relationship between the defendant and victim to ensure it actually falls within the scope of § 922(g)(9). As alluded to in the previous section on prosecution strategies, state domestic violence statutes may en-

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cal force against the person or property of another. . . . " (emphasis added)), *with* 18 U.S.C. § 921(a)(33)(A)(ii) (2014) ("[T]he term 'misdemeanor crime of domestic violence' means an offense that . . . *has, as an element, the use or attempted use of physical force*, or the threatened use of a deadly weapon. . . ." (emphasis added)).

354. *Castleman*, 134 S. Ct. at 1414.

355. Armstrong v. United States, 134 S. Ct. 1759 (2014).

356. United States v. Carter, 752 F.3d 8, 18 (1st Cir. 2014).

357. *Id.*

358. United States v. Carter, No. 2:10-cr-00155, 2014 WL 3345045, at *4 (D. Me. July 8, 2014).

compass broader relationships than those qualifying under § 922(g)(9). While not an explicit element of a § 922(g)(9) prosecution, a domestic relationship is nonetheless a critical component of a predicate offense. By undermining the domestic relationship, defense attorneys remove the federal firearm ban from the equation, and possess stronger negotiating power for a plea bargain encompassing a lesser included offense. Thus, a defense attorney should strategically focus on undercutting the prosecution's assertions of domestic relationship and intentional or purposeful mens rea, and look for ambiguity in the charging documents.

VI. CONCLUSION

The Supreme Court's decision in *Castleman* represents a bold statement against domestic abuse. In *Castleman*, the Court interpreted the phrase "use of physical force" in a misdemeanor crime of domestic violence as encompassing all offenses that involve even the slightest offensive touching. The adoption of this common law definition of "force" has resulted in the expansion of § 922(g)(9)'s applicability, and all domestic abusers who employ force against their significant others are potentially subject to the federal gun ban. This holding turned the spotlight on a previously private and silent affair, and has helped identify domestic violence as a key societal problem worthy of judicial intervention. By broadcasting the realities of everyday domestic abuse, the Court has significantly aided in bringing well-deserved attention to a national epidemic that does not discriminate on the basis of race, gender, religion, or economic status.

Despite its noble intentions, however, the Supreme Court's analysis in *Castleman* is legally unsound. The majority opinion ignores established precedent that interprets the identical phrase "use of physical force" in two similarly worded statutory provisions. In both *Johnson* and *Leocal*, the Court previously held that the use of physical force refers solely to *violent* force, not mere offensive touching. Yet, the Supreme Court disregarded these precedential opinions in favor of a broader, more expansive definition of force that better captures the horrific realities that domestic abuse victims face on a daily basis. While the Supreme Court's empathy is understandable, its ruling is incomprehensible in light of prior decisions and the rationale behind the Lautenberg Amendment.

Specifically, the Lautenberg Amendment sought to apply the federal gun ban to domestic violence misdemeanants who were originally charged with a domestic violence felony but later plea bargained down to a misdemeanor offense. The Lautenberg Amendment was never intended to encompass routine domestic violence crimes, but rather solely focused on domestic abuse sufficient to constitute a felony. The

Supreme Court's expansion of the Lautenberg Amendment exceeded its congressionally intended scope.

Moreover, while the Court's decision symbolically discourages domestic abuse, the likely reality remains that the decision will not appreciably impact the lives of domestic violence victims. Prosecutions under § 922(g)(9) have been disappointingly low since its enactment, and domestic violence misdemeanants may use other means of securing firearms, such as purchasing weapons from friends, neighbors, family members, or on the black market. The government possesses no comprehensive method of tracking gun purchases through these avenues, and the referral rate for illegal possession of firearms is similarly abysmal. Thus, widening the scope of the firearm ban will do little to increase its efficiency and effectiveness. Rather, judicial and legislative efforts should focus on educating citizens during their formative years about the dangers of abusive relationships, available resources, and characteristics of healthy relationships. Only by changing the fundamental misconceptions of society can we permanently end domestic violence.

Nonetheless, the reality remains that *Castleman* is precedent applicable in all fifty states. In light of this, it is critical that prosecutors and defense attorneys realize the negotiating power they possess at the bargaining table and strategize the most efficient presentation of their arguments. Prosecutors should concentrate on ensuring the charging documents explicitly set forth the facts and corresponding statutory elements relied upon in charging the defendant. These documents should highlight the domestic relationship between the defendant and victim, and espouse a purposeful or intentional mens rea. In contrast, defense attorneys should challenge the prosecutor's assertion of a domestic relationship where applicable, and offer evidence of a lesser mens rea—such as recklessness—that does not fall within the scope of the firearms ban. These suggestions serve to more efficiently hone the plea bargaining discussions, and prosecutors should not allow defendants to escape from the federal firearm ban simply to expeditiously move cases through the system. Rather, to give domestic violence victims the best chance of survival, prosecutors must remain dedicated to trying these cases and securing the most appropriate outcomes for victims.

While it is ultimately unlikely that *Castleman* will appreciably reduce domestic violence, it has nonetheless successfully drawn national attention to the issue of abuse. Such press coverage combined with high-profile domestic violence cases has subjected domestic abuse to well-deserved public scrutiny. By helping to remove domestic violence from the private sphere, *Castleman* may serve as a catalyst in transforming underlying societal perceptions of domestic abuse. For the time being, however, the effect of *Castleman* on the lives of everyday victims remains uncertain.